SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1997

440 COMPANY,

Petitioner,

vs.

BOROUGH OF FORT LEE, a municipal corporation, and the MAYOR and COUNCIL of the BOROUGH OF FORT LEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a municipal price-control regulation meet the standard for constitutionality enunciated by this Court in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), where there was no factual predicate for the promulgation of the regulation, *i.e.*, can a municipality impose regulations that interfere with the operation of an economic market in the absence of an underlying problem in that market?

2. Can a District Court uphold a municipal price-control regulation where the challenger's undisputed evidence and expert testimony established that there was no factual basis for the regulation and the only rebuttal offered by the municipality was the speculation of an expert who admitted that he did not have knowledge of the facts of the specific market at issue?

PARTIES TO THE PROCEEDING

Petitioner in the Court (plaintiff in the District Court and appellant in the Court of Appeals) is 440 Company (the "440 Company"). Respondents in this Court (defendants and intervenor in the District Court and appellees in the Court of Appeals) are the Borough of Fort Lee, New Jersey and the Mayor and Council of that Borough (referred to collectively as the "Borough") and the Fort Lee Tenants Association, Inc.

RULE 29.6 STATEMENT

Petitioner 440 Company has no parent company and no wholly owned subsidiaries.

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Petitioner, 440 Company, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 16, 1997, affirming the decision of the United States District Court for the District of New Jersey that was filed on December 14, 1996.

OPINIONS BELOW

The opinion of the United States District Court for the District Court of New Jersey ("District Court") was reported at 950 F. Supp. 105 and appears at App. B-5a. The opinion of the United States Court of Appeals for the Third Circuit affirming the District Court's decision was not reported and appears at App. A-1a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 16, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that

> [n]o person shall . . . be deprived of life, liberty, or property, without the due process of law . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part that no state

> shall deprive any person of life, liberty or property

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rule of Evidence 702 provides that:

> [I]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

In or around 1972, many municipalities in New Jersey, including the Borough of Fort Lee, passed rent control ordinances based on studies and legislative findings that housing shortages in the state were resulting in rent costs spiraling upward. The Fort Lee ordinance was upheld by the New Jersey Supreme Court in 1972 based on a specific determination that the municipal body had established the pre-requisites to economic regulation, namely a high vacancy rate evidencing a housing shortage. *Inganamort v. Fort Lee*, 62 N.J. 521 (1973). Since 1973, Fort Lee has amended its ordinance numerous times despite the absence of any studies or legislative findings that the housing shortage of 1973, or any other basis for rent control, currently exists. App. C-52a-90a. In 1993, Petitioner challenged a vacancy decontrol amendment to the Fort Lee ordinance that prevented a small minority of property owners, namely owners of multi-family dwellings of more than five units, from raising rents of vacant apartments beyond the amounts mandated by the underlying ordinance. Notably, that Ordinance, No. 93-33A, did not contain any legislative findings explaining its factual basis. In fact, the only significant legislative findings by the

Borough that post-date 1973 were laid out in the preamble of an Ordinance, No. 95-25A, that was introduced after the present litigation began. The text of this proposed ordinance, which never went into effect because it was subsequently vetoed by the Mayor, included a finding there was no housing emergency in the current Fort Lee housing market.

Because Ordinance No. 95-25A never went into effect and the Borough continued to enforce Ordinance No. 93-33A, Petitioner pursued its challenge of the vacancy decontrol ordinance. In the record before the District Court, Petitioner established that no housing emergency, such as a low vacancy rate or rent gouging, existed in Fort Lee and, therefore, there was no legitimate purpose for prohibiting a small group of property owners from raising rents for vacant apartments to market level. App. E-111a, 112a, 124a; App. F-129a, 130a. All the Borough offered to contradict this undisputed factual record was the speculation of an expert who conceded that he had done no studies of the current Fort Lee housing market. App. D-100a, 102a. Moreover, the expert in question had not been present at the original hearings preceding the adoption of the amendment; his testimony was simply ex-post facto conjecture prepared solely for this litigation.

Despite the absence of any facts in the record suggesting that the 1993 Vacancy Decontrol Ordinance had a legitimate rationale, the District Court upheld the Ordinance and the Third Circuit, without opinion or oral argument, affirmed. App. A-1a; App. B-5a-17a. The fundamental issue we ask the Court to address is whether a local government body is entitled to enact economic regulations, such as rent control, in the absence of any underlying rationale or basis for the legislation. Despite the fact that Fort Lee undertook no studies or investigation of the condition of the Borough's housing market since the 1970s, it has nevertheless amended its rent control ordinance six times

in the intervening years. The result is a mass of regulations that has no relationship to the housing market in Fort Lee as it exists today. Petitioner asks this Court to grant its petition for a writ of certiorari to resolve the conflict among the circuits applying this Court's decision in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), and clarify that the passage of economic regulations when there is no factual predicate showing that the market at issue is not operating efficiently is arbitrary and, therefore, unconstitutional.

A. Procedural History

The original Fort Lee Rent Control Ordinance was adopted in 1973 as a one-year emergency measure to combat a severe housing shortage that existed in the Borough at that time. In the intervening two decades, the Ordinance has been amended numerous times; these amendments were adopted absent any studies or investigations demonstrating that they were needed to resolve a crisis in the Fort Lee housing market.[1] The Complaint

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1. In its current manifestation, the Fort Lee rent control ordinance provides the following:

- all housing units in the borough are subject to rent control except owner occupied two family homes;
- rents can be increased up to 5% at the expiration of a year after the date of the last rent increase;
- qualified senior citizen's rents can only be increased in accordance with a MAP formula;
- vacancy decontrol is afforded only to single family homes and condominium or cooperative rental units;
- landlords are entitled to a reasonable rent increase only

(Cont'd)

in this action was filed on September 28, 1993 in response to an amendment in 1993 to the Borough's rent control regime that eliminated vacancy decontrol for a small minority of property owners. Consequently, units owned by those property owners could not be rented at the market rate once they became vacant. The 1993 amendment represented the fourth overhaul of vacancy decontrol in Fort Lee in a six-year period.

The arbitrariness of the Ordinance at issue is evidenced by the fact that it was the last of a series of amendments promulgated in a very short space of time, without any underlying legislative findings or studies, regulating vacancy decontrol. Prior to 1988, all rental units remained subject to strict rent control, which restricted rent increases even when units were vacated and subsequently occupied by a different tenant. From 1988 to 1993, the Borough established vacancy decontrol, (Ordinance 88-25; App. C-54a) attempted to completely eliminate vacancy decontrol (Ordinance 89-71, App.C-60a),[2] established permanent vacancy decontrol for approximately 90% of the Fort Lee housing stock and restricted

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(Cont'd)

for capital improvements that are required by local, state or federal law and are above the ordinary required facilities provided in residential structures;

- hardship increases are based upon actual initial investment;

- owners of multi-family dwellings of 5 or more units must report vacancies of more than 10 days to the Rent Leveling Board.

2. Pursuant to a court order of the Superior Court, Law Division, the Borough's attempt to repeal vacancy control in its entirety was stayed and never became effective.

approximately 10% of the Fort Lee housing stock to one-time vacancy decontrol, (Ordinance 90-32, App. C-62a), and then eliminated one-time vacancy decontrol for that same 10%. (Ordinance 93-33A, App. C-68a). Thus, vacancy decontrol in some form has been in effect since 1988 without any adverse effects on tenants or the Fort Lee housing market.

Notably, while this case was still pending before the District Court, the Borough's governing body considered the effect of the existing rent control regulations in light of the current housing market. After a public hearing on August 17, 1995, the Borough Council adopted Ordinance No. 95-25A. App. C-71a. Significantly, the Preamble of Ordinance 95-25A states the following:

- that the housing emergency that existed in the early 1970s does not exist today; given current economic conditions and the existing housing market in the Borough, it is no longer necessary or reasonable to exclude rental units in large residential buildings from permanent vacancy decontrol while affording it to all other rental units; and

- the governing body believes that a revision of the rent control ordinance was required in order to reflect the current economic conditions and the current housing market in Fort Lee.[3]

App. C-71a, 72a. As Ordinance No. 95-25A was subsequently

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3. In addition to granting vacancy decontrol to all units, the Ordinance totally revised rent control in its entirety, including reformation of, *inter alia*, capital improvement provisions.

vetoed by the Mayor and never put into effect, this case continued.[4]

On October 9th and 15th, 1996, the District Court held a bench trial. Near the end of a Letter Opinion dated December 17, 1996 (the "Opinion") that acknowledged that Petitioner's evidence and expert testimony were essentially undisputed, the District Court determined that Ordinance 93-33A had a legitimate purpose, namely, the provision of affordable housing. However, there was no evidence that the Ordinance furthered this purported goal in any way. To the contrary, experts for both parties agreed that the only way of determining whether housing was affordable was to compare the income of tenants to rents and the Borough admitted that it conducted no such comparison prior to enacting the Ordinance. App. D-94a, 98a; App. E-114a.

In fact, the only basis cited for the District Court's decision to uphold the Ordinance was the speculative testimony of Respondents' sole witness, economist Dr. Kenneth Baar, that the current high vacancy rate in the Borough "could be" the result of landlord profit maximization strategies, that vacancy decontrol "could lead" to landlord harassment of tenants and that rent control provides affordable housing. All of Dr. Baar's conjectures were contrary to the undisputed evidence adduced at the trial that none of those factors existed in the current Fort

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4. The Mayor vetoed the Ordinance on August 21, 1995, and four of the six Council members voted to override the Mayor's veto on September 14, 1995. However, the Appellate Division of the New Jersey Superior Court subsequently affirmed a trial court ruling that ownership of two rental units by one of the council members constituted a conflict of interest and nullified his affirmative vote, leaving the old Ordinance in place. Despite its invalidity, Ordinance 95-25A reflects the legislature's conclusions regarding the current conditions of the housing market in Fort Lee. No other Ordinance promulgated by the Borough draws upon any factual conclusion since 1973.

Lee housing market. Without hearing oral argument, the Third Circuit affirmed the District Court's decision without opinion by order dated September 19, 1997.

B. Statement of Facts

The housing problems that justified regulation in the early days of rent control in New Jersey are no longer present in Fort Lee. It is undisputed that the touchstone of this economic regulation, a housing shortage, does not exist in Fort Lee. Both Dr. Kenneth Baar and Dr. Susan Wachter (Petitioner's Expert) agreed that the vacancy rate in Fort Lee is well over the 5% standard for a housing shortage. App. D-91a; App. E-110a. Testimony and evidence presented at trial established that none of the other indicia usually cited as a predicate to rent control, such as rent gouging, monopoly control of the rental market or the prevalence of substandard housing, were currently present in Fort Lee. To the contrary, the undisputed record established:

- rents have been stable in Fort Lee since 1993;

(App. E-111a)

- Fort Lee has a competitive housing market with no evidence of a monopoly or oligopoly; the operation of the escrow fund established that in new leases and renewed leases for decontrolled units, negotiated rents frequently provided for less than the increase allowed under the rent control ordinance;

(App. E-111a-112a)

- as a result of vacancy decontrol between 1988 and 1993, the majority of Fort Lee rental units

are currently at market rates. Therefore, rent control has very little impact on those apartments because rents cannot be increased by more than the permitted 5% due to the competitive market;

(App. E-112a)

- no new apartment buildings were constructed in Fort Lee since the imposition of rent control over twenty years ago;

(App. E-121a; App. D-94a)

- rent control is not synonymous with affordable housing. Any affordable housing inquiry requires a comparison of the income level of the tenant to the rent of that tenant's apartment; no such inquiry was done in Fort Lee;

(App. E-114a; App. D-94a)

- in its current manifestation, the Fort Lee rent control regime is enforced against only a few landlords. Of the 109 property owners denied vacancy decontrol who were notified of their eligibility to participate in the escrow fund established during the pendency of this proceeding to collect the difference between the rents allowed by the Ordinance and market price for those units, only 10 responded. Of those 10 properties, three apartment buildings were responsible for the overwhelming majority of deposits in the fund at the time of trial;

(App. E-121a-123a)

- the ordinance grants vacancy decontrol to only single family homes, condominiums and cooperative units; any other property with two or more vacant units is denied the right to charge a market rent.

(App. C-68a-70a).

In addition to her own investigation and analysis, Dr. Wachter relied on the testimony of management representatives for Carriage House, Crystal House and Riverview Towers, the three major participants in the escrow fund, which established that competition for potential tenants has replaced the days of waiting lists for the few available units. In other words, it may have been a landlord's market in 1972, but today it is a tenant's market. For example, since the escrow fund was set up in 1993, management for the Carriage House increased decontrolled apartments' rents by less than 5% because of the dictates of the marketplace. App. F-128a. The situation at Riverview Towers is similar. Management for Riverview Towers testified that it actually lowered the rent on one of its apartments by $125 because the tenant objected to the amount of rent he was paying and management did not want to exacerbate its vacancy rate. App. F-130a. An overview of the three major participants in the escrow fund revealed that; (1) of Carriage House's 298 units, 250 are at the market rate; (2) of Riverview Towers' 136 apartments, forty percent are at market rent; and (3) of Crystal House's 127 apartments, 57 are at market rent. Thus, both before and after consideration of the effects of vacancy decontrol, the rent regulation as applied to the present housing market in Fort Lee produces no noticeable positive effect on the housing market. On the contrary, the evidence showed that these economic regulations had a profoundly negative effect on apartment buildings, a small segment of the market, thereby discouraging investment and reducing the overall housing stock. App. E-116a, 117a, 118a, 120a; App. F-131a, 137a.

This uncontroverted factual record demonstrated that the Vacancy Decontrol Ordinance, as applied to the existing facts of the Fort Lee market, does not serve any legitimate economic purpose. The only evidence offered in defense was the expert opinion of an economist, Dr. Kenneth Baar. Dr. Baar's opinion was based solely on his supposition that the purpose of the Rent Leveling Ordinance, particularly vacancy decontrol, was to provide affordable housing. However, the only factual basis for his conclusion was one sentence in a 1990 Comprehensive Housing Affordability Strategy Report that stated there was not enough affordable housing in Fort Lee based on the "feelings of observers". App. B-16a. The only support for Dr. Baar's opinion that vacant apartments should not be rented at market rates was a 1972 study of New York City that found that tenants were being coerced to leave their apartments by landlords. However, Dr. Baar conceded that he had no evidence of any harassment by any landlord during the eight years Fort Lee had vacancy decontrol. In short, the Baar opinion was unsupported by any factual evidence or even an effort to gather any factual information on which to base his opinion.

Based on the evidence cited above, Petitioner contends that there is no rational relationship between the present rent control scheme in Fort Lee, particularly Ordinance No. 93-33A, and any effort by the Borough to provide affordable housing or resolve any existing housing problem. On the contrary, Respondents failed to even show that there were any existing problems in the current housing market that justified continued enforcement of the regulation in Fort Lee.

REASONS FOR GRANTING THE WRIT

I.

ORDINANCE NO. 93-33A IS NOT RATIONALLY RELATED TO THE FURTHERANCE OF A LEGITIMATE PURPOSE; THEREFORE, IT IS ARBITRARY AND UNCONSTITUTIONAL.

A. The Standard for Determining That a Price Control Regulation is Constitutional.

Rent control is a form of price-control regulation. *Pennell v. City of San Jose*, 485 U.S. 1 (1988). The standard for determining whether a government price-control regulation is constitutional under the Due Process Clause is whether such regulation is arbitrary, discriminatory, or demonstrably irrelevant to a legitimate government purpose or policy. *Id.* at 11, *quoting Permian Basin Area Rate Cases*, 390 U.S. 747, 769-770 (1968). Ordinance No. 93-33A contains no language explaining its purpose or what policy it is intended to further. However, uncontroverted trial testimony below demonstrated that none of the indicia that justify rent control, such as monopoly power or a housing shortage, are present in the Fort Lee housing market. Consequently, the Ordinance is not premised on a problem in the housing market and bears no rational relation to a legitimate government purpose. Since Ordinance No. 93-33A is not relevant to any justifiable regulatory policy, it is arbitrary and its continued enforcement is unconstitutional. *Pennell v. City of San Jose*, at 12, *citing Nebbia v. New York*, 291 U.S. 502, 539 (1934).

To establish that a legislative action was not so arbitrary as to be unconstitutional, a price-control regulation must:

1. serve a legitimate public purpose; and

2. promulgate implementation methods that are rationally related to furthering the legitimate interest at issue.

Dolan v. City of Tigard, 512 U.S. 374, 387-390 (1994); *Blanche Road Corp. v. Bensalem Tp.*, 57 F.3d 253, 263 (3d Cir.), *cert. den.*, 226 S. Ct. 303, 133 L. Ed. 2d 208 (1995); *Midnight Sessions, Ltd. v. City of Pennsylvania*, 945 F.2d 667, 683 (3d Cir. 1991), *cert. den.*, 503 U.S. 984 (1992); *Gilbert v. City of Cambridge*, 932 F. 2d 51 (1st Cir. 1991), *cert. den.*, 502 U.S. 866 (1992), *citing Pennell v. San Jose*, 485 U.S. 1 (1987); *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1995). As discussed below, when looked at in the light of these requirements for upholding a government price-regulation, Ordinance No. 93-33A is clearly unconstitutional and the District Court and Third Circuit decisions conflict with this Court's decision in *Pennell*.

1. Ordinance No. 93-33A is Not a Rational Means of Providing Affordable Housing and Protecting Low Income Tenants.

The core of the District Court's reasoning in upholding the regulation at issue was that the provision of affordable housing was a justifiable purpose for rent control. While Petitioner has no quarrel with this general principle, the facts presented at trial established that Ordinance No. 93-33A is not rationally related to insuring the availability of affordable housing in the Borough. As an initial matter, the Ordinance does not take the income level of tenants into account or mention affordable housing as a concern. App. D-94a. Moreover, there can be no question that a determination that housing is affordable cannot be made absent a comparison of the rent to occupant income. App. E-114a. Since no studies, legislative findings or supporting data were supplied by the Respondents, and the Ordinance itself does not factor in

tenant income, any conclusion that affordable housing was the purpose of the Ordinance is no more than rank speculation. *See Adamson Co. v. City of Malibu*, 854 F. Supp. 1476, 1487 (C.D. Ca. 1994).

Notably, the Borough's own expert did not even testify that there was currently a shortage of affordable housing in the Borough.[5] He simply opined that if landlords were holding onto vacancies to inflate the vacancy rate in Fort Lee, there "could still exist a shortage of affordable housing." App. B-15a. While the same fantasy could be woven for any owner of rental property, the undisputed evidence at trial showed that under present conditions, landlords did not have the luxury of indulging in such profit maximization schemes because the current market is essentially tenant driven. Indeed, landlords have granted significant rent concessions in order to avoid exacerbating the vacancy rate. *See Adamson Co. v. City of Malibu*, 854 F. Supp. at 1491 (the court rejected Malibu's contention that a rent rollback provision was necessary to protect tenant investments when the undisputed evidence showed that the tenants were selling their mobile homes at substantial premiums throughout the period subject to the rollback). Speculation about market failure, such as that offered by Dr. Baar, is not a sufficient basis for price regulation. *Id.* at 1487.

Arguably, the only legislative findings made by the Borough about current rental conditions in Fort Lee is found in Ordinance No. 95-25A, which was promulgated in July 1995. Ordinance No. 95-25A provides that, because the housing emergency of the early 1970s no longer exists, and

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5. In fact, the Borough did not determine that a housing shortage of any kind existed prior to the passage of the Ordinance. To the contrary, the undisputed evidence at trial was that the actual vacancy rate in Fort Lee was well above the 5% rate indicative of a housing shortage. App. B-15a.

> [I]n light of the current economic conditions and the existing housing market in the Borough, it is no longer necessary or reasonable to exclude rental units in large residential building from permanent vacancy decontrol, while affording it to all other rental units.

Despite a subsequent mayoral veto, Ordinance No. 95-25A arguably represents the legislature's conclusions about current market conditions. Thus, given the most recent findings of the Borough Council, the continued denial of vacancy decontrol to a small group of property owners is completely unwarranted and arbitrary.

In short, examination of the uncontroverted evidence and testimony at trial demonstrates that, in contrast to the price regulations upheld by the Supreme Court, the Ordinance at issue was not enacted to deal with an existing problem that could not be corrected by an unregulated market. *See Block v. Hirsch*, 256 U.S. 135, 156 (1921) (approving rent control in Washington, D.C. on the basis of a Congressional finding that housing in the city was "monopolized"); *FPC v. Texaco, Inc.*, 417 U.S. 380, 397-398 (1974) (noting that regulation of the natural gas market was a response to the "threat of monopoly pricing"); *Nebbia v. New York*, 291 U.S. 502, 530 (1933) (allowing a minimal price to stand for milk to offset a discrepancy between supply and demand that resulted in large surpluses); *Pennell v. City of San Jose*, 485 U.S. at 12. The Third Circuit's decision to uphold the Ordinance also conflicts with post-*Pennell* decisions in other circuits concerning economic regulations. For example, in *Carson Harbor Village, Ltd. v. City of Carson*, 37 F.3d 468, 471 (9th Cir. 1994), *overruled on other grounds*, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997), the Ninth Circuit's determination that laws prohibiting mobile home park owners from raising rents on termination of a tenancy were constitutional noted that the legislature had made specific findings that park

tenants faced "low vacancy rates." *See also Gilbert v. City of Cambridge*, 932 F. 2d 51, 53 (1st Cir. 1991), *cert. den.*, 502 U.S. 866 (1992) (the First Circuit upheld an Ordinance restricting condominium conversions in part because the legislature had found that the vacancy rate in Cambridge had fallen below one percent). In *Adamson Co. v. City of Malibu*, 854 F. Supp. at 1485, the court followed the standard this Court established in *Pennell v. City of San Jose* by doing an in-depth factual analysis of the market at issue, mobile home rentals, to determine whether a rent control regime that encompassed rent freezes, rent rollbacks, and vacancy control provisions had a rational basis. *Id.* at 1485. Significantly, the *Adamson* court found that bald assertions by the legislature unsupported by any investigative data or studies were not a sufficient means of finding a rent control ordinance constitutional. *Id.*

Thus, although other circuits require specific factual findings by the legislature or factual evidence to find that a price regulation had a legitimate purpose, the Third Circuit in the present case did neither. The Court should take this opportunity to endorse the approach taken by the *Adamson* court. Otherwise, contrary to our carefully established system of checks and balances, towns will be able to impose price restrictions for no reason other than that they have the political will to do so.

2. As Applied in Fort Lee, Rent Control is Not Rationally Related to a Legitimate Government Purpose.

Assuming, *arguendo*, that existing conditions justified control of rent increases for vacant apartments in Fort Lee to resolve housing problems, Ordinance No. 93-33A would still have to pass a second, "rationality", test to be constitutional. *Gateway Apts. v. Mayor & Tp. County of Nutley Tp*, 605 F. Supp. 1161, 1166 (D. N.J. 1985). Once a municipality establishes that it has a legitimate goal that justifies legislative interference with

the operation of the housing market, the legislation must have a rational relationship to that goal. *Id.* If the Ordinance at issue is not reasonably calculated to fulfill its purpose, the Ordinance is unconstitutional and invalid. *Id.* The District Court's opinion is fatally flawed because its fails to address whether the Ordinance meets this second test. Moreover, Petitioner contends that when this second rationality test is conducted in this matter, it is clear that Ordinance No. 93-33A as applied is not rationally related to a legitimate purpose.

In *Dolan v. City of Tigard,* 512 U.S. at 387-390 (1994), this Court reiterated the principle that there must be a connection between the legitimate purpose and the means employed by the government for attaining that purpose to find that a regulation passes the rational relationship test. The petitioner in the *Dolan* case had sought and been denied a variance from land dedication requirements imposed by the city. In deciding whether the denial violated the petitioner's constitutional rights, the Court employed a two-stage test. The first part of the test was a determination of whether the "essential nexus" exists between the "legitimate state interest" and the challenged regulation. *Id.* A positive conclusion to the first test triggered the second test, which required a finding that the regulation met that "required degree of connection between the exactions" and the proposed impact on the regulated market. *Id.* To determine whether the second test was satisfied the Court used a "rough proportionality" test, which mandated that

> [n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Id.

The *Dolan* decision mandates that Fort Lee make at least some effort to quantify its assertion that the current regulations serve some public need. *See also Adamson v. City of Malibu,* 854 F. Supp. at 1491 (the court concluded that a price-control regulation that imposed a three-year rent freeze on mobile home spaces bore no rational relationship to a legitimate purpose because the city "had no evidence of arbitrary rent increases and did no market study"). However, the Borough conducted *no* studies regarding the condition of the Fort Lee housing market or the existence of any purported housing problems in that market prior to depriving the Petitioner of vacancy decontrol. In fact, the results of the escrow fund and the testimony of Dr. Wachter conclusively established that both before and after consideration of the effects of vacancy decontrol, the rent regulation produced no noticeable positive effect on the overall housing market in Fort Lee.

II.

DR. BAAR'S TESTIMONY DID NOT MEET THIS COURT'S STANDARDS FOR RELIABILITY AND, THEREFORE, SHOULD NOT HAVE BEEN THE BASIS OF A FINDING THAT ORDINANCE NO. 93-33A WAS CONSTITUTIONAL.

As discussed above, the sole basis for the District Court's decision that Ordinance No. 93-33A had some legitimate purpose and was, therefore, not arbitrary, was the speculative testimony of Dr. Baar. The District Court's reliance on unsubstantiated speculation that was discredited on cross-examination and contradicted by all of the factual and opinion evidence presented at trial conflicts with this Court's decision regarding standards for expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993). Acknowledging that under Federal Rule of Evidence 702,

testimony as to scientific or other specialized knowledge is intended to assist the trier of fact, this Court found that to fulfill this mandate such testimony must satisfy the following two-part test:

- it must be supported by "appropriate validation—i.e., 'good grounds,' based on what is known;" and

- it must have a have a valid "connection to the pertinent inquiry."

Id. at 589, 591. Logically, this basic standard applies equally to the social sciences. *See Tyus v. Urban Search Management*, 102 F.2d 256, 262-263 (7th Cir.), *cert. den.*, 138 L. Ed. 2d 175 (1997).

In the *Tyus* case, the court found that expert testimony must adhere to "the same standards of intellectual rigor that are demanded" in that expert's chosen field. *Id.* at 263. Here, both experts agreed that a determination of whether affordable housing was available could not be done absent an investigation of tenant income and rents. Dr. Baar conceded that he had neither looked at such an investigation nor even bothered to conduct an informal survey of apartment dwellers to support his hypothesis. Thus, according to his own standards, Dr. Baar's opinion that the provision of affordable housing was a justification for the enactment of Ordinance No. 93-33A is pure conjecture and does not meet the first prong of the *Daubert* test.

As the only studies Dr. Baar relied on bore no relation to the facts of the current Fort Lee housing market, his testimony did not meet the second prong of the *Daubert* test and should not have been the basis of the District Court's decision. For example, Dr. Baar admitted that his testimony regarding possible justifications for the Ordinance was based in part on a report

regarding New York City that was over twenty years old and did not mention Fort Lee or any municipality in New Jersey. Likewise, Dr. Baar's opinion that there "could be" a lack of affordable housing was completely irrelevant. The only factual basis this expert proffered was one sentence in the 1990 Comprehensive Housing Affordability Strategy Report that cited the "feelings of observers" as the basis of its conclusion that there was not enough of affordable housing in Fort Lee.

Pointing to no factual evidence and relying exclusively and specifically on Dr. Baar's unsupported speculations as the grounds for its conclusion that there was a legitimate basis for the Ordinance, the District Court's decision conflicts with post-*Daubert* opinions in other circuits that have uniformly rejected baseless expert testimony such as Dr. Baar's. *Cavallo v. Star Enterprise*, 892 F. Supp. 756 766 (E.D. Va. 1995), *affirmed in part, reversed in part on other grounds,* 100 F.3d 1150 (4th Cir. 1996) (for scientific evidence to be probative of a factual issue, the expert must at least demonstrate a valid basis for projecting the findings of an unrelated study to the specific factual disputes at hand); *Damon v. Sun, Inc.*, 87 F.3d 1467, 1474 (1st Cir. 1996) (an expert should not be allowed to give an opinion based on "speculation from an insufficient evidentiary foundation").

Similarly, in *Minasian v. Standard Chartered Bank. PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997), the Seventh Circuit, citing the *Daubert* case, affirmed a decision to disregard the conclusions set forth in an expert's certification because the expert

> did not gather any data on the subject, survey the published literature, or do any of the other things that a genuine expert does before forming an opinion.

The *Minasian* court concluded that an expert opinion is only as

significant as the sources that sustain it. *Id.* In the instant case, Dr. Baar conceded that he conducted no studies regarding the current Fort Lee housing market. To the contrary, he did not even attempt to test his conclusions. Given the complete lack of any factual support whatsoever in the current Fort Lee housing market for Dr. Baar's suppositions regarding justifications for rent control in the Borough, the District Court's reliance on Dr. Baar's conclusions stands in stark contrast to the law established by this Court in *Daubert*. *See also Tyger Const. Co. Inc. v. Pensacola Const. Co.*, 29 F.3d 137, 142-143 (4th Cir. 1994), *cert. den.*, 513 U.S. 1080 (1995) (admission of an expert opinion that was based on unsupported facts that were directly contradicted in the record was grounds for reversal).

Petitioner contends that the District Court's reliance on an expert's unsubstantiated speculations, which were contradicted by the record, violated this Court's decision regarding the treatment of expert testimony. As the sole basis for the District Court's opinion was expert testimony that was not reliable under the standards of *Daubert* and Federal Rule of Evidence 702, the District Court's decision and the Third Circuit's affirmation of that decision completely disregarded the Supreme Court precedent. All other evidence in the case established that there was no rational basis to apply Ordinance No. 93-33A in Fort Lee.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted

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APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 19, 1997

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5024

440 COMPANY, a New York partnership,

v.

BOROUGH OF FORT LEE, a municipal corporation, and the MAYOR and COUNCIL of the BOROUGH OF FORT LEE,

and

FORT LEE TENANTS' ASSOCIATION, INC.,

Intervenor Defendant in District Court

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(D.C. No. 93-CV-4311)
District Judge: Honorable Nicholas H. Politan

Submitted under Third Circuit LAR 34.1(a)
on September 10, 1997

Before: MANSMANN and NYGAARD, Circuit Judges,
and BLOCH, District Judge*

---

* Honorable Alan N. Bloch, District Court Judge of the Western District of Pennsylvania, sitting by designation.

Appendix A

JUDGMENT ORDER

This cause came to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Local Appellate Rule 34.1(a) on September 10, 1997.

After considering the issues raised by the Appellant, it is ADJUDGED and ORDERED that the judgment order of the district court be and hereby is AFFIRMED essentially for the reasons given by the district court in its opinion filed on December 17, 1996.

Costs taxed against the appellant.

BY THE COURT

s/ illegible
Circuit Judge

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk

DATED: SEP 19 1997

APPENDIX B — FINAL ORDER AND LETTER OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 17, 1996

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 93-4311

HON. NICHOLAS H. POLITAN

440 COMPANY,

Plaintiff,

v.

BOROUGH OF FORT LEE, et al,

Defendants,

and

FORT LEE TENANTS' ASSOCIATION, INC.,

Intervenor.

FINAL ORDER

This matter having come before the Court the Complaint of plaintiff 440 Company against defendant Borough of Fort Lee, the Mayor and Council of the Borough of Fort Lee, and defendant-intervenor Fort Lee Tenants' Association seeking to declare Fort Lee Ordinance No. 93-33A unconstitutional, and the Court having conducted a bench trial on October 9, 1996, and October 15, 1996, and having considered the matter and

having reviewed the submissions of the parties, and for the reasons appearing more particularly in the Letter Opinion in the above-mentioned matter, and good cause having been shown,

IT IS on this 17th day of December, 1996 hereby

ORDERED that the Court finds that Fort Lee Ordinance No. 93-33A is **CONSTITUTIONAL.**

s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

Appendix B

UNITED STATES DISTRICT COURT
District of New Jersey

Chambers of
NICHOLAS H. POLITAN
Judge

Martin Luther King Jr.
Federal Building &
U.S. Courthouse
50 Walnut St., Room 5076
P.O. Box 999
Newark, N.J. 07101-0999

December 17, 1996

LETTER OPINION
ORIGINAL ON FILE WITH CLERK OF THE COURT

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Appendix B

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Fort Lee Tenants' Association, Inc.

Re: 440 Company
v. Borough of Fort Lee, et al
and Fort Lee Tenants' Association, Inc.
Civil Action No. 93-4311 (NHP)

Dear Counsel:

This matter comes before the Court on the Complaint of plaintiff 440 Company against defendants Borough of Fort Lee, the Mayor and Council of the Borough of Fort Lee, and defendant-intervenor Fort Lee Tenants' Association, Inc. seeking a declaration that a municipal rent control ordinance is unconstitutional. A trial was held before the Court on October 9, 1996, and October 15, 1996. For the reasons stated herein, the Court finds that Ordinance 93-33A is **CONSTITUTIONAL**.

FINDINGS OF FACT

The Borough of Fort Lee ("Fort Lee") enacted its first rent control ordinance in 1973 (Ordinance No. 73-26).[1] This original rent leveling ordinance was amended on June 9, 1988, to provide for partial vacancy decontrol, a.k.a. one-time vacancy decontrol

1. Since the enactment of rent control in Fort Lee, only two new apartment buildings have been constructed, and these buildings have since been converted to cooperatives.

(Ordinance No. 88-25). Vacancy decontrol permitted a landlord to negotiate a market rent with a new tenant when a unit became vacant. Once this new rent was established, the unit became subject to rent control again.

Shortly thereafter, on October 26, 1989, an ordinance was passed which completely eliminated vacancy decontrol for all units (Ordinance No. 89-71). Less than one year later, however, on September 27, 1990, the ordinance was amended again to re-institute vacancy decontrol (Ordinance No. 90-32). This amendment, however, provided apartments with only partial vacancy decontrol. Single-family homes and condominium and cooperative units, on the other hand, were permitted permanent vacancy decontrol.

Following this amendment, the Fort Lee Property Owners Association, of which plaintiff 440 Company ("440") was a member, instituted an action in the Superior Court of New Jersey, Law Division, challenging the constitutionality of the ordinance. The plaintiffs challenged the distinction between properties which was made by the ordinance. By Letter Opinion, dated February 5, 1992, the Honorable Edward Van Tassel found the ordinance to be constitutional as applied. This decision was affirmed by the Appellate Division by a per curiam opinion, on February 26, 1993.

On September 14, 1993, Fort Lee amended the ordinance to eliminate vacancy decontrol for apartment buildings (Ordinance No. 93-33A).[2] Under this ordinance, however, small-

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2. The Ordinance reads, in pertinent part:

> WHEREAS, it has been determined by the governing body of the Borough of Fort lee [*sic*] that the Rent Leveling

(Cont'd)

scale landlords, *i.e.*, single-family, condominium and cooperative rental units, are afforded vacancy decontrol. Hence, owners of apartments can only increase the rent charged to a tenant up to 5% within one year, with exceptions for qualified senior citizens and disabled persons.

A landlord who wishes to increase the rent more than the allotted 5% may file a hardship application with the Rent Leveling Board. Said application is based on needed capital

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(Cont'd)

Ordinance of the Borough of Fort Lee should be amended to provide for limited vacancy decontrol as being in the best interests of the citizens of Fort Lee

NOW, THEREFORE, be it ordained as follows:

Section 1. Chapter 22, Section 2 of the Revised General Ordinances of the Borough of Fort Lee be and is hereby amended by the deletion therefrom of the words "Partial Vacancy Decontrol" in the title and wherever such words may appear. In addition, Chapter 22, Section 2.8(a) be and is hereby repealed and replaced with the following:

"22-2.8 *Single Family, Condominium and Cooperative Limited Vacancy Decontrol.*

a. In the event that any single family, condominium or cooperative rental unit shall become vacant, the landlord upon each such vacancy shall, subject to the registration provisions hereinafter set forth in Section C, be free to rent said dwelling unit at a rental price mutually-agreeable between landlord and tenant."

improvements and/or increases in the landlord's property taxes. These applications require that the landlord not be able to earn at least a 10% rate of return on the owner's original investment. In addition, the applicant is required to pay for all the expenses of the application, including those of Fort Lee. Prior to 1988, before vacancy decontrol was instituted, approximately ten hardship applications were filed per year. In 1988 and 1989 respectively, after the enactment of vacancy decontrol, three applications were filed. The last four hardship applications were filed in Fort Lee in 1990, and of those four only one was granted, two were denied, and one was withdrawn.

440 Company owns and operates an apartment building in Fort Lee called the Carriage House. The Carriage House was built in 1972 by a previous owner. 440 purchased the Carriage House in 1980. Since the time 440 purchased the Carriage House until 1988, when vacancy decontrol was instituted, no capital improvements were made to the building. During the period of vacancy decontrol, 440 updated the apartments which became vacant, including new kitchens and bathrooms, and increased the rent to a negotiated market value.[3] Since the elimination of vacancy decontrol for apartments, 440 has not made improvements to basic building systems, such as heating, plumbing or roofing. Currently, forty-eight of the 298 units at the Carriage House are subject to rent control.[4]

On September 29, 1993, 440 filed the instant Complaint

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3. The same is true for other apartment buildings owned in Fort Lee, including River View Towers and Crystal House.

4. Of the 561 units for rent by the Carriage House, River View Towers and Crystal House combined, approximately 184 are subject to rent control. These units, which are subject to rent control are renting at a price lower than the present market value.

and Order to Show Cause with Temporary Restraints, seeking to restrain and enjoin defendants from enforcing the provisions of Ordinance 93-33A or, in the alternative, to establish an escrow fund to preserve the status quo and to protect the parties' rights during the pendency of the litigation. After hearings were held on October 18, 1993, and October 19, 1993, the Court ordered the establishment of an escrow fund, which became effective on October 19, 1993. A special master, Liza M. Walsh, Esq., was appointed to supervise the fund.[5] Thereafter, 440 moved for summary judgment. After entertaining oral argument, the Court reserved decision on the motion and permitted the governing body an opportunity to revisit the ordinances.

Consequently, on August 17, 1995, Fort Lee adopted an ordinance which provided for permanent vacancy decontrol for all rental units, including apartment buildings (Ordinance No. 95-25A). The Mayor vetoed the ordinance a few days later, but the Council overrode the Mayor's veto with four affirmative votes, on September 14, 1995. This ordinance, however, was invalidated by the New Jersey Superior Court, Law Division, because the ownership of two rental units by a council member constituted a conflict of interest. The Appellate Division affirmed the trial court's decision to vacate the ordinance. Therefore, Ordinance 93-33A is still in effect and the subject of this litigation.

Thereafter, this Court held a status conference, signed an Order permitting the Fort Lee Tenants' Association to intervene, and set a trial date. A bench trial was held on October 9, 1996, and October 15, 1996.

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5. A total of 109 property owners were notified of the fund, and ten participated.

Appendix B

CONCLUSIONS OF LAW

Pursuant to the police powers provided in the Constitution of the United States, local governments have the power to enact rent control ordinances. *Albigese v. Jersey City*, 127 N.J. Super. 101, 108 (Law Div.), *modified on other grounds*, 129 N.J. Super. 567 (App. Div. 1974); *see also* N.J.S.A. 40:48-2 (authorizing municipalities to enact rent control ordinances). Such ordinances are presumed to be valid and based on adequate factual findings. *Hutton Park Gardens v. Town Council of the Town of West Orange*, 68 N.J. 543, 564 (1975); *Cromwell Assocs. v. Mayor & Council of City of Newark*, 211 N.J. Super. 462, 470 (Law Div. 1985). This presumption of validity can only be overcome by clear and convincing evidence which shows that the ordinance in question has no rational basis. *Helmsley v. Borough of Fort Lee*, 78 N.J. 200, 218, *appeal dismissed*, 440 U.S. 978 (1978); *Cromwell*, 211 N.J. Super. at 470.[6]

If there is a rational basis for the ordinance, the ordinance will be upheld as valid. *Id.* at 209. The Court must determine

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6. Plaintiff asserts that the ordinance in question does not deserve a presumption of validity because it is one of a series of arbitrary ordinances. Plaintiff cites New Jersey Supreme Court decisions *Southern Burlington County, N.A.A.C.P. v. Mount Laurel*, 92 N.J. 158 (1983), and *Kruvant v. Mayor & Council of the Twp. of Cedar Grove*, 82 N.J. 435 (1980). The court in these cases, however, stressed the importance and uniqueness of the particular case which warranted the shifting of the burden from plaintiff to defendant. *Mt. Laurel*, 92 N.J. at 306. For example, the court found that the actions of the respective municipalities was dilatory. *Id.* Furthermore, in *Mt. Laurel*, the court determined that the interest protected was more than economic, but "one of the basic necessities of life." *Id.* at 306-07. The instant case is one of typicality, *i.e.*, a constitutional challenge to a rent control ordinance involving economic interests. Therefore, the presumption of validity is applicable.

whether the ordinance has "a reasonable relation to a proper legislative purpose." *Brunetti v. Borough of New Milford*, 68 N.J. 576, 594 (1975). "Under the rational-basis test of equal protection . . . , a statute must be upheld if it is rationally related to a legitimate state interest. [ ] 'In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification . . . .' " *New Jersey State League of Municipalities v. State of New Jersey*, 257 N.J. Super. 509, 518 (App. Div. 1992) (quotation omitted), *cert. dismissed*, 133 N.J. 423, *appeal dismissed*, 133 N.J. 419 (1993).

Specifically, the validity of a rent control ordinance depends upon the existence of conditions that justify the use of municipal police power to regulate prices. *Brunetti*, 68 N.J. at 594. Although it is not necessary that a housing emergency exist to support the enactment of rent control ordinances, a problem must exist which could not be corrected in an unregulated market. *Id.*; *see also Pennell v. City of San Jose*, 485 U.S. 1, 11-12 (1988). Therefore, the municipality which enacted the ordinance must have "had any set of facts within its contemplation which would have permitted it to rationally conclude that the competitive rental housing market was not operating in the public interest." *Troy Hills Village v. Township Council of Parsippany-Troy Hills Twp.*, 68 N.J. 604, 616 (1975); *see also Hutton*, 68 N.J. at 564-66.

Once the basis for the legislation is articulated by the municipality, the ordinance must be a rational means to obtaining that goal. *Gateway Apts., Inc. v. Mayor & Twp. of Council of Nutley Twp.*, 605 F. Supp. 1161, 1166 (D.N.J. 1985). "[T]he Court has no right to interfere with the legislative discretion so long as the result comports with rationality." *Albigese*, 127 N.J. Super. at 116. Furthermore, "[m]unicipalities holding properly

delegated powers may legislate according to 'reasonable classification of the objects of the legislation or the persons whom it affects.' " *399 Lincoln Assocs. v. City of Orange Twp.*, 244 N.J. Super. 238, 241 (App. Div. 1990) (quoting *Guill v. Mayor & Council of City of Hoboken*, 21 N.J. 574, 582 (1956)). "However, the classification cannot be arbitrary or illusory, but must bear some just and reasonable connection with the primary object of the legislation." *Id.*

In the instant case, Fort Lee has enacted Ordinance No. 93-33A which permits vacancy decontrol for single-family, condominium and cooperative rental units. This decontrolled status permits the qualified landlords to increase rent to market value when an apartment becomes vacant. On the other hand, all other rental properties, including apartment buildings, are still subject to rent control. Essentially, therefore, the rent on these properties may only be increased by up to 5% per annum and through the granting of hardship applications.

An almost identical challenge to that presented by 440 was asserted by a plaintiff against the city of Jersey City in *Albigese v. Jersey City*. *See* 127 N.J. Super. 101. In that case, the plaintiff, an owner of several apartments buildings, attacked the constitutionality of an ordinance which imposed rent control on "buildings having more than four dwelling units." *Id.* at 107. The plaintiff asserted that the classification was unreasonable and constituted unconstitutional discrimination. *Id.* at 108. The Superior Court of New Jersey, Law Division, found that the governing body's conclusion that "it was unnecessary to control the rents in smaller buildings with less than five units, and that the emergency resulting from the pattern of excessive increases was mainly centralized in the larger buildings" was reasonable. *Id.* at 116. Hence, the court concluded that it could not interfere

with a reasonable classification within the discretion of the legislature. *Id. Compare AMN, Inc. v. Township of So. Brunswick Rent Leveling Bd.*, 93 N.J. 518, 525-26 (1983) (holding rent control ordinance unreasonably discriminatory and unconstitutional when it differentiated between attached and detached single-family dwellings).

A similar situation was addressed by the United States Supreme Court in *Pennell v. City of San Jose*. *See* 485 U.S. 1. Plaintiffs in *Pennell*, a landlord and a homeowners association, challenged a city ordinance which allowed a hearing officer to consider "the 'hardship to a tenant' when determining whether to approve a rent increase proposed by a landlord." *Id.* at 4. The plaintiffs challenged this classification as unconstitutional under the Equal Protection Clause. *Id.* The Court concluded that within the scheme of protecting tenants, the ordinance represented "a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." *Id.* at 13. Therefore, the Court held that the ordinance was rationally related to that legitimate interest. *Id.* at 15.[7]

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7. Plaintiff relies on numerous cases for the proposition that any classification distinguishing types of dwelling units is unreasonable and unconstitutional. *See Boulevard Apts., Inc. v. Mayor & Council of Borough of Lodi*, 110 N.J. Super. 406 (App. Div. 1970); *399 Lincoln Assocs. v. City of Orange Twp.*, 244 N.J. Super. 238 (App. Div. 1990); *WHS Realty Co. v. Town of Morristown*, 283 N.J. Super. 139 (App. Div. 1995). These cases, however, are inapposite because they deal exclusively with garbage collection ordinances. The courts in these cases were analyzing the rationality of the municipalities which tried to distinguish between the amount of garbage produced by and economic interests of apartment buildings. Here, the Court is examining a different ordinance, *i.e.*, rent control, supported by different rational bases. The cases cited in the above text are more directly on point.

Appendix B

In the case *sub judice*, plaintiff's expert, Dr. Susan Wachter, testified that there was no housing shortage in Fort Lee, rents are stable, and rent regulation has no impact on the market. Dr. Wachter based these conclusions on data from the most recent national Census of 1990, an analysis of Fort Lee and its Rent Leveling Board, as well as a study of the escrow fund. Dr. Wachter concluded that the vacancy rate of apartments in Fort Lee is 9.55%. After a study of the escrow fund, Dr. Wachter concluded that less than 1% of the housing in Fort Lee is impacted by rent control. Therefore, the doctor concluded, the rent control ordinance does not have an impact on housing in Fort Lee. Finally, Dr. Wachter noted that rent control does not necessarily provide affordable housing because it requires a comparison of rent to income. In fact, the doctor opined, rent control has decreased the value of buildings and discouraged the new construction of apartment buildings in Fort Lee.

In contrast, defendant's expert, Dr. Kenneth K. Baar, asserted the three reasons previously annunciated by the United States Supreme Court for rent control, including the prevention of excessive rent increases and the maintenance of affordable housing. The doctor admitted that the rent controlled units are of a lower quality than the units which are permitted to rent at market value. Furthermore, Dr. Barr calculated the vacancy rate in Fort Lee to be 6.8%. While Dr. Barr conceded that the standard vacancy rate which indicated a housing shortage was 5% or less, he posited that this high vacancy rate could be due to landlord profit maximization strategies, *i.e.*, allowing a unit to remain vacant for a longer period of time to obtain a higher rent. Therefore, Dr. Barr opined, there could still exist a shortage of affordable housing. However, Dr. Barr also studied the 1990 Census in arriving at his conclusion and such data did not include an analysis of the income level of renters.

Appendix B

In his report, Dr. Baar asserted three reasons why the distinction between apartments and smaller rental units is rational. First, Dr. Baar stated that there were differences in the mode of operation of landlords of large apartment complexes and small scale renters. For example, large landlords are "less caring or responsible to tenants' demands" and "tend to be 'rent maximizers.' " (Report of Dr. Kenneth K. Baar, Sept. 1996). Second, condominium owners are not permitted to pass through increases in property taxes to tenants by increasing rents. Third, Dr. Barr asserted that Fort Lee eliminated vacancy decontrol because it was afraid that the continued conversion of apartments to condominiums or cooperatives would create a shortage of affordable rental housing. Finally, Dr. Baar posited that vacancy decontrol leads to landlord harassment of tenants to vacate units and increase rent. On cross-examination, Dr. Baar revealed that this harassment theory was the conclusion of a 1972 study performed in New York City. Dr. Baar also relied on the Comprehensive Housing Affordability Strategy ("CHAS") Report, which found that there was not enough affordable housing in Fort Lee based on the "feelings of observers."

In light of Dr. Baar's testimony, plaintiff has failed to demonstrate by clear and convincing evidence that the ordinance is not supported by a rational basis. The lack of affordable housing in Fort Lee is a rational basis for enacting such an ordinance. Furthermore, plaintiff has not rebutted defendants' reasons for distinguishing between large apartment buildings and smaller rental units. Hence, plaintiff has failed to overcome the presumption that the ordinance is reasonable and based on adequate factual findings.

Appendix B

CONCLUSION

For the foregoing reasons, the Court finds that Fort Lee Ordinance 93-33A in **CONSTITUTIONAL.**

An appropriate Order accompanies this Opinion.

s/ Nicholas H. Politan
NICHOLAS H. POLITAN
U.S.D.J.

APPENDIX C — BOROUGH OF FORT LEE RENT CONTROL STATUTE AND SUBSEQUENT ORDINANCES AMENDING STATUTE

CHAPTER XXII

RENT LEVELING BOARD

22-1 DEFINITIONS. As used in this chapter.

a. "Base rent" shall mean the legal allowable rent that a landlord may charge a tenant, upon which automatic percentage increases may be computed.

b. Reserved.

c. "Class 1 dwelling" shall mean any dwelling in which the landlord provides to the tenant all utilities (heat, electric, gas and water) for the tenant's dwelling unit at the landlord's sole expense.

d. "Class 2 dwelling" shall mean any dwelling other than a Class 1 dwelling.

e. "Dwelling" shall mean and include any building or structure or trailer or land used as a trailer park, rented or offered for rent to one or more tenants or family units. Exempt from this chapter are motels, hotels and structures containing less than three units of housing space in which one such unit is owner occupied.

f. "Housing space" shall mean and include that portion of a dwelling, rented or offered for rent for

living or dwelling purposes to one individual or family unit, together with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use or occupancy of such portion of the property.

g. "Index" shall mean the consumer price index (all items) for the region of the United States of which Fort Lee, New Jersey, is a part, published periodically by the Bureau of Labor Statistics, United States Department of Labor.

h. "Landlord" shall mean the person who owns, purports to own or exercises control of any dwelling.

i. "Periodic tenant" shall mean any month to month tenant or any tenant at will, or sufferance, or any tenant having a lease for a term of less than one year.

j. "Rent" shall mean the amount of consideration including any bonus, benefit, or gratuity demanded or received by virtue of any agreement between the parties whereby upon the payment of a sum certain by the one party (hereinafter "tenant"), the other (hereinafter "landlord") allows to him the peaceful and quiet enjoyment of the use and occupation of the unit of housing space for that time period. If the parties agree that rent is to be paid upon some interval other than one month, then that shall be construed as an alternative method of payment and the monthly rent shall be calculated by apportioning the rent so as to

determine the sum due for the term of one month. Where the parties have covenanted to provide for increments during the term of their agreement, such increments shall not be averaged up as an alternative method of payment calculation.

k. "Surcharge" shall mean any allowable payment not included in base rent.

22-2 RENT INCREASE CALCULATIONS.

22-2.1 *Rental Increases.*

a. Subject to the provisions of partial vacancy decontrol set forth in subsection 22-2.8, allowable rent increases for all other rental units falling within the borough's rent leveling ordinances shall be determined as set forth herein.

b. At the expiration of a period of not less than 12 consecutive calendar months following the effective date of the last rental increase, a landlord may receive an increase in the rent for such rental unit not to exceed five percent of the prior base rent, subject to paragraph c. below.

c. The maximum allowable annual rent increase that a landlord may charge a qualified senior citizen or disabled person shall be determined by the MAP formula and guidelines as set forth in the borough's rent leveling ordinances in effect prior to the effective date hereof. The definition that shall be used to determine qualification by a senior citizen or

disabled person is the definition utilized to determine protected tenancy status pursuant to the "Senior Citizen and Disabled Person Protected Tenancy Act" (N.J.S.A. 2A:18-61.22, et seq.).

d. The borough's rent leveling board is hereby empowered with the authority to hear and determine all applications for qualification as a senior citizen or disabled person.

e. Any rent increase other than as provided in this chapter shall be void.

22-2.2 *MAP Calculation.*

a. The MAP shall be calculated annually as hereinafter provided. The MAP for a class 1 dwelling shall consist of the Operating Costs Adjustment (OCA) + Tax Adjustment (TA) + Utilities Adjustment (UA) + Prior Year Carryover (PYC), if any. The MAP for a class 2 dwelling shall consist of OCA + TA + PYC, if any.

b. The TA shall not be added to the MAP calculation whenever a real property tax increase has occurred as the result of a conversion of the apartment dwelling from rental to condominium or cooperative ownership.*

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* Editor's Note: Pursuant to Section II of Ordinance 85-9, the provisions of the amendment in paragraph b, of subsection 22-2.2 hereof shall apply to all other sections of Ordinance No. 79-10, and any amendments thereto, insofar as calculation of MAP is concerned.

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22-2.3 *OCA Calculation.* The OCA for any calendar year shall be calculated by multiplying the percentage change in the "Housing" element of the Index for the 12-month period ending in October of the last prior calendar year by .35.

22-2.4 *TA Calculation.* The TA for any calendar year for any dwelling shall be calculated in accordance with the following formula: .15 x the result of T.2-T.1 divided by T.1, where:

T2 equals all local property taxes finally assessed with respect to the dwelling for the last prior calendar year (after giving effect to any judgment of the Bergen County Board of Taxation with respect to said year;)

T1 equals all local property taxes finally assessed with respect to the dwelling for the next-to-last prior calendar year (after giving effect to any judgment of the Bergen County Board of Taxation with respect to said year;)

For purposes of calculating the TA, any contiguous complex of dwellings owned and operated by the same landlord shall be aggregated and treated as one dwelling.

22-2.5 *UA Calculation.* The UA for any calendar year shall be calculated by multiplying the percentage change in the "gas and electricity" element of the Index for the 12-month period ending in October of the last prior calendar year by .1.

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22-2.6 *PYC Calculation.* Notwithstanding the provisions of subsection 22-2.2, if the MAP in any calendar year exceeds 6.5 percent for any class 1 dwelling or 5 percent for any class 2 dwelling, the MAP for said calendar year shall be limited to 6.5 percent or 5 percent respectively for such dwelling and the excess percentage shall constitute the PYC for said dwelling for the subsequent calendar year.

22-2.7 *Excessive Rental Void.* Any rental charge in excess of that authorized by the provisions of this chapter shall be void.

22-2.8 *Partial Vacancy Decontrol.*

a. In the event that any rental unit, as defined under the borough's rent leveling ordinance, shall become vacant, the landlord shall be free to rent said dwelling unit at a rental price mutually agreeable between landlord and tenant.

b. For the purposes of this section, a vacancy shall be defined as a voluntary termination of the tenancy by the tenant or an eviction pursuant to the effective provisions of the laws of the State of New Jersey dealing with landlords and tenants. The existence of such vacancy shall be determined in any case by a court of competent jurisdiction. A cooperative proprietary lease shall not be construed as a lease for purposes of this ordinance.

c. Once a new rental is established as provided above, said dwelling unit shall again, in all respects,

be subject to the rent leveling ordinances of the Borough of Fort Lee, including, but not limited to, the provisions of subsection 22-2.12A hereof.

1. It is the express intention hereof that vacancy decontrol as herein described shall be limited to the initial tenancy or leasehold established and registered with the rent leveling board after a vacancy exists or occurs subsequent to the effective date of this amendment. The specific intention being to provide for a one time vacancy decontrol.

2. Notwithstanding anything herein contained to the contrary any landlord establishing a new rental pursuant to the provisions of this section shall within 60 days from the date of commencement of such new rental, register with the rent leveling board the information required by paragraphs a. through f. under subsection 22-2.12A of this chapter in order to qualify for the benefit of this section.

d. Once a new rental becomes vacant, any hardship or other surcharge increase over and above the prior tenant's base rental shall expire.

e. In the event a tenant vacates an apartment in order to occupy another apartment within the same building, subject to paragraph c. above, the vacated dwelling unit shall qualify for partial vacancy

decontrol but the base rent in the apartment to be occupied cannot be increased more the fifteen 15 percent from the prior base rent.

f. The provisions of this section shall be applicable to single family homes, condominium and cooperative rental units. However, once a vacancy in such a unit occurs as defined in paragraph c. hereof, the provisions of this section shall not be applicable. It is the express intention hereof that single family homes, condominium and cooperative rental units shall be provided permanent vacancy decontrol.

22-2.9 *Multiple-Year Lease.* Nothing herein shall be construed as preventing a landlord and a tenant from entering into a lease for a period in excess of one year. A multiple-year lease may provide for an increase in a subsequent calendar year; provided, however, that any subsequent rental increases shall not exceed the MAP for the subsequent calendar year for which an increase is provided.

22-2.10 *Manner of MAP Calculation.* The MAP for any calendar year commencing after the effective date hereof shall be promulgated in the following manner. Not later than November 20, the tax assessor shall certify to the board the amount of any judgment of the Bergen County Board of Taxation reducing the assessment of any dwelling for the current year. Not later than November 30, the rent leveling board shall promulgate the OCA,

UA (if applicable), TA, PYC and MAP for each dwelling for the forthcoming calendar year.

22-2.11 *Provisions Not to Be Misconstrued.* The provisions of subsection 22-1.10 are hereby declared to be solely for furthering the orderly administration of this chapter, and shall not be construed as affecting or conditioning any rights or duties of landlords or tenants hereunder.

22-2.12 *Rent Increase Notification.* Any landlord seeking a rent increase shall notify the tenant by certified mail and the rent leveling board of the calculations involved in computing the increase, including the base rent and the calculations involved in computing the OCA, UA (if applicable), TA, PYC, MAP. In furtherance of this subsection, the rent leveling board may, by rule or regulation, prescribe a form or forms to be employed by the landlord in complying with the provisions hereof.

22-2.12A *Landlord to Register With Rent Board.* Every landlord shall register with the rent board and provide the following information:

a. Name and address of owner, including all partners' names and if a corporation, name of registered agent;

b. Name and address of managing agent, if any;

c. Number of apartment units;

d. Rent being charged for each unit;

e. Number of tenants residing in each unit;

f. Age of building.

Failure of any landlord to register in accordance with the provisions of this subsection at least six months prior to seeking relief under this chapter shall preclude the landlord from obtaining any such relief.

22-2.13 *Invalidity; Determination.* If subsections 22-2.2 through 22-2.6 shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, then the establishment of rents between a landlord and a tenant shall be determined by the provisions of this subsection. At the expiration of a lease or at the termination of the lease of a tenant, no landlord may request or receive a percentage increase in rent for any housing space which is greater than the percentage difference between the index three months prior to the expiration or termination of the lease and the index at the date the last previous lease term commenced. For a periodic tenant whose lease term shall be less than one year, said tenant shall not suffer or be caused to pay any rent increase in any calendar year which exceeds the average index percentage differential for the calendar year prior thereto.

22-2.14 *Capital Improvement.*

a. Notwithstanding anything herein contained

to the contrary, a landlord shall be entitled to a reasonable rent increase for such capital improvements as are specifically required by local, State or Federal law or regulation and are over and above the ordinary required facilities provided in residential structures. Said increase shall be determined by the rent leveling board pursuant to application filed in accordance with the rules and regulations of the board as adopted or to be adopted.

b. Nothing herein contained shall be construed to prevent the tenant, at the tenant's option, from making any interior improvement at the tenant's own cost and expense in the tenant's apartment, provided that such improvement and/or installation of appliances is compatible with the amenities already present in the apartment and provided further that such improvement and/or appliances shall thereafter become the property of the landlord, and provided further that the landlord shall approve such improvement which approval shall not be unreasonably withheld.

22-3 APPLICATIONS TO BOARD.

22-3.1 *Landlord May Apply.* A landlord may apply to the rent leveling board (hereinafter "board") for an increase in rent in excess of that permitted in section 22-2 hereof upon a showing that the increases permitted in section 22-2 hereof will not yield a rental such that the landlord will earn a fair and reasonable return.

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22-3.2 *Notice to Tenant; Documentation Open to Inspection.* Simultaneously with the filing of an application for increase in rental with the board, the landlord shall deliver notice thereof to each tenant. All documentation filed with the board shall be open to inspection by an affected tenant or their legal representative. Any such notice delivered to the tenant shall include, but shall not be limited to, a statement that all such documentation filed under this chapter be available for inspection at the office of the rent leveling board.

22-3.3 *Notice of Hearing.* Immediately upon receipt of a hearing date from the board, the landlord shall notify all affected tenants of the date. Prior to the commencement of any hearing, the landlord shall file an affidavit of proof of service of notice with the board.

22-3.4 *Determination by Board; Unreasonable Delay.* The year of application shall be the calendar or fiscal year immediately succeeding the calendar or fiscal year last utilized by the landlord in maintaining his books and records and it shall be the period of operation upon which the board shall base its determination.

Except as provided below, no relief may be collected until granted by the board. The board shall not unreasonably delay in the rendering of its determination of any application for increased rentals.

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In the event the board does not render a determination within four months of the filing of the landlord's application, one-half of the increased rentals sought shall, at the discretion of the landlord, be collected in accordance with this chapter and shall be subject to retroactive adjustment by the board upon its determination. Such four month period may be extended by written consent of the landlord. In the event the board concludes that its delay in rendering a decision is caused by the landlord, the landlord shall be prohibited from commencing any collection of increased rentals sought until the board renders its determination.

22-3.5 *Increase Granted; Percentage Calculated.* A landlord shall be entitled to an increase in rent under this section if said landlord is being deprived of earning a fair and reasonable return on his actual investment.

a. The board shall make a determination regarding the landlord's investment in the subject premises and a fair return thereon. In computing the income necessary to achieve a fair return, the board shall allow reasonable operating expenses, considering their useful life and debt service.

The useful life of an expense item shall be defined as that number of years reasonably expected to pass before that same expense will again be incurred. The past history of the building, where applicable, shall be used as a guideline in determining useful life. Where the useful life of an

expense item exceeds one year, such expense shall be prorated over the entire useful life of the expense item. When relief has been granted for an expense item having a useful life in excess of one year, and having a cost equal to a greater than one percent of the then rent roll, such increase shall be treated as a surcharge on the tenant's rent only for the period of the useful life of the expense item and shall thereafter terminate unless the same expense recurs. The surcharge shall not be part of the base rent. At the time of such recurrence, the newly calculated prorated expense may be added to the rent as a new surcharge as determined by the rent leveling board over its then determined useful life.

Debt service shall include interest, principal reduction and mortgage insurance premium, where applicable. In the event there has been a refinancing of prior mortgages, the board shall review actual disposition of the proceeds of the refinancing as a part of its determination of investment and debt service. Depreciation is specifically excluded as an allowable expense. Real estate tax increases directly attributable to conversions of premises to a condominium or cooperative are specifically excluded as an allowable expense. The landlord's investment is hereby defined as the original cash investment at the time of purchase, less any withdrawals at the time of refinancing or at any other time. No inflation factor may be applied to such investment.

b. The board shall use actual expenses for the

period of relief insofar as it is known at the time of the filing of the application for relief. Where such actual costs are unknown the board shall project said unknown costs in accordance with the following formula:

The actual costs for the calendar or fiscal year of the landlord prior to the date of filing of the application for relief shall be multiplied by the Percentage Inflation Factor (PIF), which shall yield the allowable operating expense. The PIF is defined as the percentage change of the New York/ Northeastern New Jersey Consumer Price Index available for the latest 12 consecutive months available at the time of filing of the application for relief.

c. As a part of the application for relief, a landlord shall submit to the board its anticipated income for the period of relief, considering all automatic increases to base rent that may come due during the said period. Anticipated income shall include, but not be limited to, income from residential rents, garage rents, additional facilities and laundry and vending commissions.

d. The board shall deny all or a part of the relief requested where specific findings of fact support the conclusion that the landlord purchased the subject premises for an excessive price. Excessive purchase price is hereby defined as the purchase price such that at the time of purchase a reasonable investor could not expect to earn a fair return upon his investment.

e. The relief granted shall increase the actual income yielded by the subject premises to that income necessary to enable the landlord to earn a fair return upon his actual investment.

f. Wherever practicable, the board shall require of the applicant professionally certified documentation of all pertinent financial data offered in support of an application under this section, except that the board may exercise its reasonable discretion to waive this requirement if the cost to the applicant is deemed to outweigh the need for professional certification.

g. On all applications subsequent to a conversion, the board shall singularly analyze each item of alleged increase expenses and disregard and disallow any items attributable to said conversion.

h. Any increase granted under this section shall be in lieu of and not in addition to any increase granted under subsection 22-2.1 et seq.

i. No increase granted pursuant to this section shall take effect until the borough's construction official or designated representative, after a reasonable inspection of the premises, notifies the board in writing that said premises is in substantial compliance with the borough's maintenance code and State Uniform Construction Code.

j. No increase granted pursuant to this section shall take effect until the borough's tax collector

notifies the board in writing that all property taxes are current except for arrearages authorized by law, and any tax rebates due have been paid.

22-3.6 *Exception; Expense Ratio A Factor.* Notwithstanding anything to the contrary herein, no landlord shall be entitled to a percentage increase greater than that permitted under section 22-2 hereof unless the average expense ratio of the landlord for the three years preceding the year immediately preceding the year of application is less than the expense ratio for the year immediately preceding the year of application. The expense ratio means reasonable and necessary operating expenses as defined in subsection 22-3.5 hereof divided by total income.

22-3.7 *Landlord to File Statement of Operations.* As soon as available, but not later than six months from the date of the filing of an application for increased rental, the landlord shall file with the board a statement of operations setting forth its actual costs for the first six months of the year of application.

In the event the landlord provides the board with its actual cost expense reflecting the first six months of the year of application, the board may dispense with the review as provided for in this subsection.

The board shall review the statement of operations, may hold public hearings and/or require the filing of additional data. Within two months of

receipt of the statement of operations, the board shall make such adjustments to the relief granted as is manifested by the actual six month cost experience. The board is not required to make any adjustments in the relief in the event that the actual six month cost experience does not significantly differ from the reasonable and necessary operating expenses as determined by the board heretofore. In the event the board shall fail to make an adjustment within the two month period, the original relief granted shall become final. In the event the landlord shall fail to file the statement of operations with the six month period, the relief granted shall automatically terminate and base rent shall revert to the base rents in effect prior to the date of application. For good cause shown, the board may extend the six month filing period for an additional period not to exceed three months. Simultaneously with the filing of the statement of operations, the landlord shall notify the affected tenants of the filing. Notwithstanding anything contained in this subsection, the initial determination of the board shall be deemed final for purposes of appeal.

Any increased or adjusted rental granted pursuant to subsection 22-3.5 and this subsection shall be subject to further and retroactive adjustment subsequent to distribution from an escrow fund established in the action entitled HELMSLEY, ET AL V. BOROUGH OF FORT LEE, ET AL.

22-3.8 *Board to Grant One Increase In Any One Year.* The board shall not grant an increased

rental to a landlord upon more than one application for any one year.

22-3.9 *Notice Given By Certified Mail; Posted Conspicuously.* Any notice to be given pursuant to section 22-3 of this Chapter shall be served by certified mail. In addition to the aforesaid, copies of the notice shall be posted in conspicuous locations within the premises, including but not limited to mail rooms, lobbies, elevators and laundry rooms. From time to time, the board may promulgate forms to be utilized whenever notice is required, and to adopt such rules and regulations as are necessary to implement the intent of this subsection.

22-3.10 *Applicant to Establish Escrow Account.* Upon submission of an application, and in addition to any fees established in subsection 22-8.1 hereof, the applicant shall be required to establish an escrow account with the borough.

Upon receipt of an application for relief, the board shall forthwith send a copy thereof to any professional experts retained to assist the board in the processing of the application. Within five days of receipt, the professional experts shall submit to the board an estimate of funds sufficient in amount to undertake the professional services to be rendered.

The applicant shall forthwith deposit such funds in the escrow account maintained by the tax collector of the borough. The professional experts shall submit vouchers for all reasonable and necessary fees for

the professional services rendered, which fees shall be paid from the escrow account in the manner prescribed by N.J.S. 40A:5-16 through 18.

The professional expert shall, at the time of submission of any such voucher, forward a copy of same to the applicant. In the event that the applicant questions the reasonableness of any such voucher, the applicant shall, not later than five days after receipt of a copy of the voucher, make written protest of such voucher to the board. In no event shall the board authorize the payment of any voucher submitted pursuant to this subsection sooner than ten days from its submission.

Any of the aforesaid monies left in the escrow account upon completion of the application shall be returned to the applicant as soon as is practicably possible.

Should additional funds be required after the original funds are exhausted, such funds shall be necessary, in the judgment of the board, shall be paid by the applicant to the tax collector of the borough and placed in the escrow account.

The board shall take no formal action on any application unless and until all escrow funds have been deposited with the tax collector of the borough and any time limitations set forth in this Chapter shall be extended until all such escrow funds are deposited with the tax collector.

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22-3.11 *Tenant to be Notified of Application for Relief.* No relief shall be effective as to any new or renewal tenancy relationship entered into after the effective date of this Chapter unless the landlord, as part of a lease, has provided written and conspicuous notice of the pendency or possibility of any application for relief and for the six month review provided for in subsection 22-3.7 hereof, which notice shall be separately signed by the tenant. In the event of an oral lease, the landlord at the time of the creation or renewal of the tenancy relationship, shall provide written actual notice of the aforesaid.

22-3.12 *Lease to Expire; Tenant Has Grace Period.* Where a lease is due to expire within 60 days from the granting of any relief by the board pursuant to subsection 22-3.5, the tenant shall have the right to remain in possession, without renewing the lease for a period not to exceed 90 days following the date of receipt of the board's determination. The tenant shall pay the increased rentals granted by the board until the premises are vacated.

22-4 CAPITAL IMPROVEMENT OR ADDITIONAL SERVICES INCREASE.

22-4.1 Reserved.

22-4.2 *Landlord Foregoes Increase: Notifies Board.* Where a landlord because of unusual circumstances is agreeable to forego the maximum allowable rent, he may apply to the board setting forth the reasons therefor in order to protect the base

rent, so that the higher rent is not waived as the base for a future tenant.

22-4.3 *Personalized Services.* Where a tenant or landlord requests that the rental to be charged be in excess of that allowed pursuant to the provisions of this chapter by virtue of personalized services, furnishing, furniture, equipment, facility, alteration, improvement or other special addition to their housing space, or by virtue of the granting of an option to purchase the unit, for which the landlord and tenant have negotiated a mutually satisfactory agreement as to price and terms of payment, the landlord must submit a copy of the proposed lease (including the provision regarding the specialized service or option to purchase) to the board for its review and its prior approval.

The borough shall have the right to conduct a hearing, call witnesses, require certified documentation and/or expert testimony concerning the value of the personalized services, option to purchase, additional amenities and/or concessions being offered by the landlord.

In the event that any party files a complaint to the board with regard to any lease contemplated by this section which has either been disapproved by the board or has not been previously approved by the board, for a determination that the rental being charged is in violation of the provisions of this chapter, the tenant shall be entitled to a rollback of the rental in accordance with the maximum rental

provisions allowed pursuant to other provisions of this chapter.

The fact that the parties voluntarily entered into an agreement not approved by the board or not submitted to the board for prior approval shall not be a defense to such a complaint.

No lease contemplated by this section shall be approved by the board at any time after the filing of a complaint under this section.

22-5 BOARD CONSTRUCTION; POWERS AND DUTIES.

22-5.1 *Board Continued.* The rent leveling board as heretofore constituted is hereby continued. The members currently serving on the board may continue to do so until their term expires and until their successors shall have qualified.

22-5.2 *Members Appointed; Term.* The board shall consist of seven members appointed by the mayor with the advice and consent of the council, all of whom shall serve without compensation, and at least one of whom shall be a landlord or the managing agent of a landlord and one of whom shall be a tenant and one of whom shall be a homeowner and one of whom shall be a resident owner of a co-operative or condominium apartment. Upon the expiration of the term of any member, the mayor, with the advice and consent of the council, shall appoint a citizen for a term of three years. Vacancies

occurring in the board shall be filled by the mayor with the advice and consent of the council for the unexpired term only. A member of the board shall be removable for cause by the governing body upon written charges and after public hearing thereon.

The board shall not elect a chairperson for each year until after the completed reorganization of the board and after each of the new appointments shall have been seated and qualified. The intent of this paragraph is to assure that all new appointments have the right to vote for a chairperson during the initial year of their appointment.

22-5.3 *Powers and Duties.* The board is hereby granted, and shall have and exercise, in addition to other powers herein granted, all the powers necessary and appropriate to carry out and execute the purposes of this ordinance including but not limited to, the following:

a. To issue and promulgate such rules and regulations as it deems necessary to implement the purposes of this chapter, which rules and regulations shall have the force of law until revised, repealed or amended from time to time by the board in the exercise of its discretion, provided that such rules and regulations are approved, modified or disapproved by resolution of the mayor and council, which resolution approving, modifying or disapproving such rules and regulations shall be adopted by the mayor and council within 90 days from receipt thereof, in the event the mayor and

council fail to adopt said resolution within 90 days, the rules and regulations shall be deemed to be approved by the mayor and council in the form submitted.

b. To supply information and assistance to landlords and tenants to help them comply with the provisions of this chapter.

c. To hold hearings and adjudicate applications from landlords for additional rental as provided herein.

d. To hold hearings and adjudicate applications from tenants for reduced rental as provided herein.

e. To enforce the provisions of this chapter and to initiate proceedings in the municipal court for willful violations thereof.

f. To issue subpoenas to compel the attendance of witnesses and the production of books and records in connection with hearings held pursuant to the provisions of this chapter.

The board shall give both landlord and tenant reasonable opportunity to be heard before making any determination.

22-5.4 *Appeals to Governing Body.*

a. Any determination of the board may be appealed by an affected landlord or tenant to the

governing body. The appeal shall be made in writing and filed with the borough clerk within 20 days from the receipt of the board's determination and shall set forth the specific basis for the appeal. The appellant shall deliver a copy of the notice of appeal by certified mail or personal service to each affected party.

b. The governing body may thereafter hold a hearing on the appeal, which hearing shall be de novo unless a transcript or stipulation of facts is supplied. In the event the governing body does not hold a hearing on the appeal within 60 days of the filing of the appeal, the determination of the board shall be deemed affirmed.

22-6 RESPONSIBILITIES OF LANDLORD.

22-6.1 *Maintain Standards.* During the term of this chapter, the landlord shall maintain the same standards of service, maintenance, furniture, furnishings and equipment in the housing space and dwelling as he provided or was required to do by law or lease on the date the lease was entered into. Any violation hereof shall subject the landlord to punishment under section 22-9 hereunder.

Anti-Harrassment Provisions:

a. Any conduct, direct or indirect, committed by a landlord, or anyone on his behalf, which results in the harrassment of a tenant, including, but not limited to, a reduction of services, bothersome

telephone calls or letters, bellringing, frivolous eviction threats or legal proceedings shall be unlawful and shall constitute a violation of this chapter. A complaint for this violation can be brought in the Fort Lee Municipal Court and must be filed within 90 days of the alleged act of harrassment.

b. Upon a finding that a landlord was guilty of harrassment under this act, the court shall impose a fine of up to one thousand ($1,000.00) dollars per act of harrassment with a minimum mandatory fine of one hundred fifty ($150.00) dollars for a first offense; three hundred ($300.00) dollars for a second offense and five hundred ($500.00) dollars for each subsequent offense. Each day or part thereof of such harrassment shall constitute a separate offense for the purposes of this section. In addition the court may impose any one or more or parts of the following penalties:

1. A forfeiture of prospective rent increases on the unit in question for a period of three years.

2. Reimbursement to the aforesaid affected tenant of up to six months rent.

c. Landlords shall distribute to all current and future tenants a notice reciting the entire anti-harrassment laws of the Borough of Fort Lee.

22-6.2 *Increases Must Be Authorized.* No landlord shall after the effective date of this chapter

charge any rents in excess of what he was receiving before the effective date of this Chapter except for increases as authorized by this chapter.

22-6.3 *Exceptions to Initial Rent Provisions.* The owner of any housing space or dwelling which shall be completed after January 1, 1977 shall not be restricted in the initial rent charged with respect to such housing space or dwelling.

22-7 REPEALER CLAUSE.

The provisions of any existing borough ordinance which are inconsistent with the above amendments to the rent leveling ordinance are hereby deemed repealed. The provisions of the within amendments shall not have a retroactive effect. All provisions of the existing borough ordinance which are not inconsistent herewith shall continue to be in full force and effect.

If any one clause or portion of this chapter shall be determined to be unenforceable or unconstitutional, the unaffected portions of this chapter shall remain in full force and effect.

22-8 SCHEDULE OF FEES.

22-8.1 *Established.* There is hereby established the following schedule of fees for complaints and applications to the board which fees shall be payable to the tax collector of the borough.

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Complaint filing fee	$ 2.00
Landlord application for increased rental due to capital improvement; services or tax surcharge	15.00
Landlord's application for hardship relief	15.00

22-9 VIOLATION AND PENALTY.

A violation of any provision of this chapter including but not limited to the filing with the rent leveling board of any misstatement of fact, shall be punishable by a fine of not more than two hundred ($200.00) dollars and imprisonment for not more than 30 days or both. A violation affecting more than one leasehold shall be considered a separate violation as to each leasehold.

22-10 CONSTRUE CHAPTER LIBERALLY.

This chapter, being necessary for the welfare of the borough and its inhabitants, shall be liberally construed to effectuate the purposes thereof.

22-11 APPOINTMENT OF ATTORNEY.

The mayor and council reserve and retain the right to annually appoint an attorney to represent the rent leveling board and set his or her salary.

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22-12 VIOLATION BY RENTAL AGENT OR REAL ESTATE BROKER.

In the event that any rental agent or real estate broker is party to a lease agreement which violates the maximum allowable rental provisions of this chapter, said agent/broker and the agency for which the agent is employed or associated shall be in violation of this chapter, and shall be subject to the penalty provisions contained in section 22-9. In addition to any penalty imposed by the municipal court, the New Jersey Real Estate Commission Licensing Board shall be notified of any violation hereunder.

22-13 ANTI-WAREHOUSING RULES AND REGULATIONS.

22-13.1 *Obligation to Register Vacant Apartments.*

a. Owners of multi-family dwellings of five units or more shall report any vacancy or unrented apartment to the rent leveling board if the vacancy or nonrental continues for ten continuous days.

b. Owners will report the rental of the unit to the rent leveling board. The rental report shall include, address of building, designation of the unit, data of rental, rent charged, name of new tenant, date of move in by the new tenant.

22-13.2 *Exempt Dwellings.* The following are exempt from the provisions of this section:

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a. Units in owner-occupied dwellings where there are five units or less and one of the units is owner-occupied.

b. Units in newly-constructed buildings which are being rented for the first time. After the first rental, such units will be subject to the provisions of this section.

c. Units in a dwelling where the owner has been finally registered for conversion of the building into a condominium or cooperative pursuant to N.J.S.A. 2A:18-61.1, so long as the conversion plan is not abandoned.

d. Units in hotels or motels.

22-13.3 *Requirements.* All such units shall be rented and occupied by a tenant within 60 days after the end of the preceding tenancy, which shall be defined as the last day of residence by the preceding tenant(s), except where an extension has been granted by the rent board under the provisions of subsection 22-13.4e below, in which event the unit shall be rented and occupied within the time period specified in the extension. Failure to comply with the requirements of 22-13.4e shall be considered a violation of this section and subject the owner to the penalties set forth herein.

22-13.4 *Extension of Time Period.*

a. An owner may apply for an extension of the time period set forth in subsection 22-13.3 where

the condition of the unit or other special circumstances make rental within such time period impossible. In order to obtain an extension, the owner must submit an application in writing to the rent leveling board within 30 days or less from the date the preceding tenancy ended setting forth with specificity:

1. The reasons that the unit cannot be rented within such time period;

2. The steps the owner shall take to remedy the conditions that make it impossible to rent the dwelling unit; and

3. The date by which the dwelling unit shall be rented and occupied.

b. The owner shall provide the rent board with all documentation necessary to support the application, including but not limited to code violation reports, engineering or inspection reports, copies of advertisements, etc.

c. Any extension granted by the rent board shall specify the date by which the dwelling unit must be rented and occupied. Additional extensions may be sought by the owner, but the total extension permitted in the aggregate shall not extend beyond six months from the date the previous tenancy ended.

d. The following circumstances shall constitute grounds for the granting of an extension pursuant to subsection 22-13.4a above by the rent leveling board:

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1. An owner wishes to reserve a vacant dwelling unit for a family member. The owner shall provide in the extension application full documentation including the name of the future tenant, the family relationship and the date of occupancy.

2. An owner desires to maintain a dwelling unit vacant in order to improve the conditions of said dwelling unit. The owner shall provide full documentation in the application, including up-to-date building and housing inspection reports, improvement plans, all related required permits, and the date by which the unit shall be rented and occupied.

3. An owner maintains a vacant dwelling unit in order to correct code violations in said unit. The owner shall provide in the application full documentation such as code violation reports, correction plans, permits and the date by which the dwelling unit shall be rented and occupied.

e. Extension of the time period provided in subsection 22-13.3 of this section beyond the maximum time prescribed by subsection 22-13.4d above shall be only granted upon a clear and convincing showing by the owner that a good faith effort has been made to rent the dwelling unit at the legal rent, and that no tenant can be found. In this

circumstance, the maximum extension granted beyond the maximum time provided in subsection 22-13.4d above shall be 60 days, renewable upon a new showing by the owner.

22-13.5 *Borough to Inspect Vacant Units and Buildings.*

a. If a unit is not rented within 90 days, the recording agency will notify the building department, health department . . .

* * *

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BOROUGH OF FORT LEE
BERGEN COUNTY
ORDINANCE NO. 73-26

Introduced: s/ illegible Date: 6/20/73

Seconded: s/ illegible

Date of Final Passage: _____

Approved: s/ illegible Date: 7/11/73

AN ORDINANCE AMENDING ORDINANCE NO. 72-1 (RENT LEVELING ORDINANCE) OF THE BOROUGH OF FORT LEE AND ESTABLISHING A SCHEDULE OF FEES FOR COMPLAINTS AND APPLICATIONS TO THE RENT LEVELING BOARD.

BE IT ORDAINED by the Mayor and Council of the Borough of Fort Lee as follows:

SECTION 1. Section 1(b) of Ordinance No. 72-1 is hereby amended to read as follows:

> (b) "Dwelling" means and includes any building or structure or trailer or land used as a trailer park, rented or offered for rent or lease to three or more tenants or family units. Exempt from this Ordinance are motels, hotels and structures of a similar use, and structures or buildings containing less than three housing units. Housing units, newly constructed and rented for the first time are exempted, and the initial rent may be determined by the landlord. All subsequent rents shall be subject to the provisions of this Ordinance without regard to the status of the tenant.

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SECTION 2. Sections 2 and 4 of Ordinance No. 72-1 are hereby amended to delete therefrom the phrase "sixty (60) days prior" and to insert in place thereof the phrase "ninety (90) days prior".

SECTION 3. The second paragraph of Section 11 of Ordinance No. 72-1 is hereby amended to read as follows:

> Except as herein provided the powers herein granted to the Rent Leveling Board are advisory powers and its findings shall be subject to review by the Governing Body.

SECTION 4. There is hereby established the following schedule of fees for Complaints and Applications to the Rent Leveling Board, which fees shall be payable to the Tax Collector of the Borough of Fort Lee:

Complaint Filing Fee	$2.00
Complaint Hearing Fee (to be paid by the unsuccessful party)	$5.00
Landlord application for increased rental due to hardship, capital improvements, services or tax surcharge	$15.00

This Section shall constitute Section 21 of Ordinance No. 72-1 as amended.

SECTION 5. This Ordinance shall take effect immediately upon final adoption, approval and publication as required by law.

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BOROUGH OF FORT LEE -- BERGEN COUNTY

ORDINANCE NO. 88-25

ORDINANCE AMENDING PORTIONS OF CHAPTER 22 (RENT LEVELING BOARD)

Section 22-22.8 of the General Ordinances of the Borough of Fort Lee is amended as follows:

PARTIAL VACANCY DECONTROL

A. In the event that any rental unit, as defined under the Borough's rent leveling ordinance, shall become vacant, the landlord shall be free to rent said dwelling unit at a rental price mutually agreeable between landlord and tenant.

B. Once a new rental is established as provided above, said dwelling unit shall again, in all respects, be subject to the rent leveling ordinances of the Borough of Fort Lee.

C. Subleasing or more than occasional or temporary vacation of the unit shall constitute a vacancy, so that the partial vacancy decontrol provisions of Subsection (A) above would apply. A cooperative proprietary lease shall not be construed as a lease for purposes of this section.

D. Once a rental unit becomes vacant, any hardship or other surcharge increase over and above the prior tenant's base rental shall expire.

E. Any dwelling unit currently receiving subsidy from the Fort Lee Housing Authority shall be exempt from and not be subject to the above partial vacancy decontrol provisions.

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F. In the event a tenant vacates an apartment in order to occupy another apartment within the same building, subject to Subsection (B) above, the vacated dwelling unit shall qualify for partial vacancy decontrol but the base rent in the apartment to be occupied cannot be increased more than 10% from the prior base rent.

Section 22-2.1 is hereby amended as follows:

RENTAL INCREASES

A. Subject to the provisions of Partial Vacancy Decontrol set forth above, allowable rent increases for all other rental units falling within the Borough's rent leveling ordinances shall be determined as set forth herein.

B. At the expiration of a period of not less than twelve (12) consecutive calendar months following the effective date of the last rental increase, a landlord may receive an increase in the rent for such rental unit not to exceed five per cent (5%) of the prior base rent, subject to section (C) below.

C. The maximum allowable annual rent increase that a landlord may charge a qualified senior citizen or disabled person shall be determined by the MAP formula and guidelines as set forth in the Borough's rent leveling ordinances in effect prior to the effective date hereof. The definition that shall be used to determine qualification by a senior citizen or disabled person is the definition utilized to determine protected tenancy status pursuant to the "Senior Citizen and Disabled Person Protected Tenancy Act" (N.J.S.A. 2A:18-61.22, et seq.).

D. The Borough's Rent Leveling Board is hereby empowered with the authority to hear and determine all

applications for qualification as a senior citizen or disabled person.

E. Any rent increase other than as provided in this ordinance shall be void.

Section 22-6.1 is hereby amended to include:

ANTI-HARASSMENT PROVISIONS

A. Any conduct, direct or indirect, committed by a landlord, or anyone on his behalf, which results in the harassment of a tenant, such as a reduction of services, bothersome telephone calls or letters, bellringing, frivolous eviction threats or legal proceedings shall be unlawful and shall constitute a violation of this ordinance. A complaint for this violation can be brought in the Fort Lee Municipal Court, and must be filed within 90 days of the alleged act of harassment.

B. Upon a finding that a landlord was guilty of harassment under this act, the Court in its discretion may impose any one or more or parts of the following penalties:

1. A fine of up to $500 per act of harassment;

2. A forfeiture of prospective rent increases on the unit in question for a period of three (3) years;

3. Reimbursement to the affected tenant of up to six (6) months rent.

C. Landlords shall distribute to all current and future tenants a notice reciting the entire anti-harassment laws of the Borough of Fort Lee.

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Section 22-5.4 is hereby amended as follows:

APPEALS TO GOVERNING BODY

A. Any determination of the Board may be appealed by an affected landlord or tenant to the Governing Body. The appeal shall be made in writing and filed with the Borough Clerk within twenty (20) days from the receipt of the Board's determination and shall set forth the specific basis for the appeal. The appellant shall deliver a copy of the notice of appeal by certified mail or personal service to each affected party.

B. The Governing Body may thereafter hold a hearing on the appeal, which hearing shall be *de novo* unless a transcript or stipulation of facts is supplied. In the event the Governing Body does not hold a hearing on the appeal within sixty (60) days of the filing of the appeal, the determination of the Board shall be deemed affirmed.

Section 22.7 of General Ordinances of the Borough is hereby amended as follows:

REPEALER CLAUSE

The provisions of any existing Borough ordinance which are inconsistent with the above amendments to the Rent Leveling Ordinance are hereby deemed repealed. The provisions of the within amendments shall not have a retroactive effect. All provisions of the existing Borough ordinance which are not inconsistent herewith shall continue to be in full force and effect.

If any one clause or portion of this ordinance shall be determined to be unenforceable or unconstitutional, the

unaffected portions of this ordinance shall remain in full force and effect.

This ordinance shall take effect immediately upon passage and publication.

s/ illegible

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BOROUGH OF FORT LEE — BERGEN COUNTY

ORDINANCE NO. 88-47

**AN ORDINANCE AMENDING
ORDINANCE #88-25
CONCERNING RENT LEVELING**

WHEREAS, the existing Borough Ordinance exempted dwelling units receiving subsidies from the Fort Lee Housing Authority; and

WHEREAS, it has come to the attention of the Governing Body that said exemption may be causing a reduction in the availability of apartments,

NOW, THEREFORE, BE IT ORDAINED that section E. of Ordinance #88-25 is hereby rescinded so that units receiving subsidies from the Fort Lee Housing Authority shall be subject to the vacancy decontrol provisions of Ordinance #88-25.

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BOROUGH OF FORT LEE — BERGEN COUNTY

ORDINANCE NO. 89-71

ORDINANCE AMENDING PORTIONS OF CHAPTER 22 (RENT LEVELING BOARD) OF THE GENERAL ORDINANCES OF THE BOROUGH OF FORT LEE AND REPEALING PARTIAL VACANCY DECONTROL

WHEREAS it has been determined by the Governing Body of the Borough of Fort Lee that partial vacancy decontrol is not in the best interests of the citizens of Fort Lee.

NOW THEREFORE BE IT ORDAINED as follows:

SECTION I

A). Those amendments to Section 22-2.8 (incorrectly referred to in Ordinance #88-25 as Section 22-22.8) in Ordinance #88-25, effective June 9, 1988, under title "Partial Vacancy Decontrol" are hereby repealed in their entirety.

B). Section 22-2.8 shall hereafter read as follows: "VACANCY NOT RELIEF". A vacancy in housing space shall not relieve the landlord from the controls of the MAP formula and guidelines set forth in this chapter.

SECTION II

A). Those amendments to Section 22-2.1 in Ordinance #88-25, effective June 9, 1988, under title of "Rental Increases" are repealed in their entirety, except Sections "C" and "D" which shall remain in full force and effect.

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B). Section 22-2.1 shall hereafter read as follows:

ALLOWABLE RENT. Except as otherwise in this chapter provided, no landlord shall request or receive in any twelve (12) month period, any rent with respect to any housing space which is greater than:

a. The last base rent charged and allowable for the housing space in the last prior calendar year; plus,

b. The Maximum Allowable Percentage (MAP) as herein defined as the increased rental provided for in subsection 22-3.5 hereunder, where applicable, of the last base rent.

SECTION III

The following sections to Ordinance #88-29 are hereby repealed:

A). Section 2 entitled "Notice of Rental of Decontrolled Unit".

B). Section 3 entitled "Partial Vacancy Decontrol".

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BOROUGH OF FORT LEE

BERGEN COUNTY, NEW JERSEY

ORDINANCE NO. 90-32

ORDINANCE AMENDING PORTIONS OF CHAPTER 22 (RENT LEVELING BOARD) OF THE GENERAL ORDINANCES OF THE BOROUGH OF FORT LEE AND REINSTITUTING PARTIAL VACANCY DECONTROL

WHEREAS, it has been determined by the Mayor and Council of the Borough of Fort Lee that partial vacancy decontrol as defined herein is in the best interests of the citizens of Fort Lee;

NOW THEREFORE BE IT ORDAINED by the Mayor and Council of the Borough of Fort Lee as follows:

SECTION I.

SECTION I. of Ordinance No. 89-71 entitled "An Ordinance Amending Portions of Chapter 22 (Rent Leveling Board) of General Ordinances of the Borough of Fort Lee and Repealing Partial Vacancy Decontrol" is hereby repealed and deleted.

In substitution therefor the following shall constitute the provisions of Section 22-2.8 in Ordinance No. 88-25:

"22-2.8 Partial Vacancy Decontrol.

a. In the event that any rental unit, as defined under the Borough's rent leveling ordinance, shall

become vacant, the landlord shall be free to rent said dwelling unit at a rental price mutually agreeable between landlord and tenant.

b. For the purposes of this Section, a vacancy shall be defined as a voluntary termination of the tenancy by the tenant or an eviction pursuant to the effective provisions of the laws of the State of New Jersey dealing with landlords and tenants. The existence of such vacancy shall be determined in any case by a Court of competent jurisdiction. A cooperative Proprietary Lease shall not be construed as a lease for purposes of this ordinance.

c. Once a new rental is established as provided above, said dwelling unit shall again, in all respects, be subject to the rent leveling ordinances of the Borough of Fort Lee, including, but not limited to, the provisions of Section 22-2.12a hereof.

1. It is the express intention hereof that vacancy decontrol as herein described shall be limited to the initial tenancy or leasehold established and registered with the Rent Leveling Board after a vacancy exists or occurs subsequent to the effective date of this amendment. The specific intention being to provide for a one (1) time vacancy decontrol.

2. Notwithstanding anything herein contained to the contrary any landlord establishing a new rental pursuant to the

provisions of this section shall within 60 days from the date of commencement of such new rental, register with the Rent Leveling Board the information required by paragraphs A through F under Section 22-2.12A of this chapter in order to qualify for the benefit of this section.

d. Once a new rental becomes vacant, any hardship or other surcharge increase over and above the prior tenant's base rental shall expire.

e. In the event a tenant vacates an apartment in order to occupy another apartment within the same building, subject to paragraph c above, the vacated dwelling unit shall qualify for partial vacancy decontrol but the base rent in the apartment to be occupied cannot be increased more than 15% from the prior base rent.

f. The provisions of this section shall be applicable to single family homes, condominium and cooperative rental units. However, once a vacancy in such a unit occurs as defined in subsection "c" hereof, the provisions of this section shall not be applicable. It is the express intention hereof that single family homes, condominium and cooperative rental units shall be provided permanent vacancy decontrol."

SECTION II

Section 22-6.1 a. and b. of Ordinance #88-25 shall be and hereby are deleted and in place and stead thereof there shall be included the following:

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"Anti-Harrassment Provisions.

a. Any conduct, direct or indirect, committed by a landlord, or anyone on his behalf, which results in the harrassment of a tenant, including, but not limited to, a reduction of services, bothersome telephone calls or letters, bellringing, frivolous eviction threats or legal proceedings shall be unlawful and shall constitute a violation of this chapter. A complaint for this violation can be brought in the Fort Lee Municipal Court and must be filed within 90 days of the alleged act of harrassment.

b. Upon a finding that a landlord was guilty of harrassment under this act, the Court *shall* impose a fine of up to One Thousand Dollars ($1,000.00) per act of harrassment with a minimum mandatory fine of One Hundred Fifty Dollars ($150.00) for a first offense; $300.00 for a second offense and $500.00 for each subsequent offense. Each day or part thereof of such harassment shall constitute a separate offense for the purposes of this section. In addition the Court may impose any one or more or parts of the following penalties:

1. A forfeiture of prospective rent increases on the unit in question for a period of three years.

2. Reimbursement to the aforesaid affected tenant of up to six months rent.

c. Landlords shall distribute to all current and future tenants a notice reciting the entire anti-harrassment laws of the Borough of Fort Lee."

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SECTION III.

Ordinance 88-25 shall be amended and supplemented by the addition thereto of the following:

"Section 22.2.14 Capital Improvement.

a. Notwithstanding anything herein contained to the contrary, a landlord shall be entitled to a reasonable rental increase for such capital improvements as are specifically required by local, state or federal law or regulation and are over and above the ordinary required facilities provided in residential structures. Said increase shall be determined by the Rent Leveling Board pursuant to application filed in accordance with the rules and regulations of the Board as adopted or to be adopted.

b. Nothing herein contained shall be construed to prevent the tenant, at the tenant's option, from making any interior improvement at the tenant's own cost and expense in the tenant's apartment, provided that such improvement and/or installation of appliances is compatible with the amenities already present in the apartment and provided further that such improvement and/or appliances shall thereafter become the property of the landlord, and provided further that the landlord shall approve such improvement which approval shall not be unreasonably withheld.

SECTION IV.

Ordinance 88-25 shall be amended and supplemented by the addition to paragraph "a" thereof of the following: "which

resolution adopting, appealing or amending such rules and regulations shall be adopted by the Mayor and Council within 90 days from receipt hereof, in failure of which action such rules and regulations shall be deemed to be approved by the Mayor and Council in the form submitted".

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BOROUGH OF FORT LEE
ORDINANCE NO. 93-33A

ORDINANCE AMENDING PORTIONS OF CHAPTER 22 (RENT LEVELING BOARD) OF THE GENERAL ORDINANCES OF THE BOROUGH OF FORT LEE

WHEREAS, it has been determined by the governing body of the Borough of Fort Lee that the Rent Leveling Ordinance of the Borough of Fort Lee should be amended to provide for limited vacancy decontrol as being in the best interests of the citizens of Fort Lee

NOW, THEREFORE, be it ordained an follows:

Section 1. Chapter 22, Section 2 of the Revised General Ordinances of the Borough of Fort Lee be and is hereby amended by the deletion therefrom of the words "Partial Vacancy Decontrol" in the title and wherever such words may appear. In addition, Chapter 22, Section 2.8(a) be and is hereby repealed and replaced with the following:

"22-2.8 *Single Family, Condominium and Cooperative Limited Vacancy Decontrol.*

a. In the event that any single family, condominium or cooperative rental unit shall become vacant, the landlord upon each such vacancy shall, subject to the registration provisions hereinafter set forth in Section C, be free to rent said dwelling unit at a rental price mutually agreeable between landlord and tenant."

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Section 2. Chapter 22 of the General Ordinances be and is hereby further amended by the deletion therefrom of subsections 22.2-8, c1 and c2, and subsections e and f, and Section 22-2.14, and the addition thereto, in place and stead thereof, of the following:

> C. Notwithstanding anything contained herein to the contrary, any landlord of a single family condominium or cooperative rental unit, establishing a new rental pursuant to the provisions of this or any other Section of this Ordinance shall, within 60 days from the date of commencement of any such new rental, register said new rental and tenant with the Rent Leveling Board, on forms promulgated by the Rent Leveling Board, in order to qualify for such new rental. A landlord who fails to register pursuant to this Section shall not be entitled to such limited vacancy decontrol for such new rental at any time during occupancy by the new tenant.
>
> D. Any landlord of any unit not subject to any vacancy decontrol establishing a new rental pursuant to this Chapter shall, within 60 days from the date of such new rental, register said new rental and tenant to the Rent Leveling Board on forms to be promulgated by the Rent Leveling Board.
>
> E. In the event that any tenant residing in a building or complex not subject to limited vacancy decontrol, as set forth herein, vacates an apartment for another apartment in the same building or complex by agreement with the landlord, the base rent of the apartment to be occupied cannot be

increased by more than 15 percent of the prior base rent.

Section 3. This ordinance shall take effect 20 days after the first publication thereof after final adoption.

s/ Jack Alter
JACK ALTER, MAYOR

ATTEST:

s/ Gladys Brunell
GLADYS BRUNELL, CLERK

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BOROUGH OF FORT LEE

ORDINANCE #95-25A

AN ORDINANCE TO RESCIND CHAPTER XXII OF THE REVISED GENERAL ORDINANCES OF THE BOROUGH OF FORT LEE AND TO ENACT A REVISED CHAPTER XXII "RENT LEVELING"

WHEREAS, the Borough of Fort Lee enacted its first rent control ordinance in 1972, by Ordinance 72-1; and

WHEREAS, as the character of Fort Lee has changed over the years, the governing body has revised and amended the rent leveling ordinance to reflect those changes; and

WHEREAS, the original rent leveling ordinance was superseded by Ordinance 74-32, effective November 6, 1974; and

WHEREAS, there have been various amendments to the rent leveling ordinance, including Ordinance No. 88-25, adopted June 9, 1989, Ordinance No. 90-32, adopted September 27, 1990, and the most recent amendment by Ordinance 93-33A, adopted September 14, 1993; and

WHEREAS, as a result of the various amendments, all rental units within the Borough of Fort Lee are entitled to permanent vacancy decontrol, with the exception of rental units in large residential apartment buildings; and

WHEREAS, the original rent control ordinance was enacted in response to a housing emergency which existed in the early 1970's, due to the number of rental units being converted to condominiums and cooperatives; and

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WHEREAS, the housing emergency which existed in the early 1970's does not exist today; and

WHEREAS, in light of the current economic conditions and the existing housing market in the Borough, it is no longer necessary or reasonable to exclude rental units in large residential buildings from permanent vacancy decontrol, while affording it to all other rental units; and

WHEREAS, the governing body believes that a revision of the rent control ordinance at this time is required in order to reflect the current economic conditions and the current housing market in the Borough; and

WHEREAS, the governing body believes that it is in the best interests of the residents of Fort Lee to enact a rent control ordinance which continues to protect senior citizens and disabled persons, as well as those tenants who are presently in rent controlled units, from unreasonable rent increases while allowing landlords to realize their constitutionally protected right to receive a fair and reasonable return

WHEREAS, it is the intention of the governing body to provide for permanent vacancy decontrol for all rental units within the Borough;

NOW, THEREFORE, BE IT ORDAINED, as follows:

Section I Chapter XXII of the General Ordinances of the Borough of Fort Lee shall be rescinded and replaced and superseded by the following Ordinance

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CHAPTER XXII

RENT LEVELING

22-1 DEFINITIONS. As used in this chapter.

a. "Base rent" shall mean the legal allowable rent a landlord may charge a tenant, upon which increases may be computed, exclusive of any capital improvement passthrough. A capital improvement surcharge shall not be considered as rent for the purpose of calculating the base rent.

b. "Capital Improvement" shall mean and include the creation, development or replacement of a significant component of the building: (a) which is deemed depreciable under the Internal Revenue Code, other than for ordinary repairs; (b) which is for the operation, preservation and/or maintenance of the structure; and (c) which usage or benefit is intended for the general tenancy of that building. By way of illustration, a "capital improvement" may include, but shall not be limited to renovation or replacement of existing HVAC systems components, resurfacing of exterior building walls, roof replacement, rewiring of the entire building, renovation or modernization of all bathrooms or kitchens in the building, replacement of all windows in the building and installation or upgrading of elevators. Whether or not a project constitutes a "capital improvement" within the meaning of this Ordinance shall be determined by the rent leveling board, which determination shall be appealable to the Mayor and Council.

c. "Dwelling" shall mean and include any building or structure or trailer or land used as a trailer park, rented or offered for rent to one or more tenants or family units. Exempt from this chapter are motels, hotels and structures containing six units of housing space or less.

d. "Housing space" shall mean and include that portion of a dwelling, rented or offered for rent for living or dwelling purposes to one individual or family unit, together with all privileges, services, furnishings, furniture, equipment, facilities and improvements connected with the use of occupancy or such portion of the property.

e. "Landlord" shall mean the person who owns or exercises control of any dwelling.

f. "Rent" shall mean the amount of consideration including any bonus, benefit, or gratuity demanded or received by virtue of any agreement between the parties whereby upon the payment of a sum certain by the one party (hereinafter "tenant"), the other (hereinafter "landlord") allows to him the peaceful and quiet enjoyment of the use and occupation of the unit of housing space for that time period. If the parties agree that rent is to be paid upon some interval other than one month, then that shall be construed as an alternative method of payment and the monthly rent shall be calculated by apportioning the rents so as to determine the sum due for the term of one month. Where the parties have covenanted to provide for increments during the term of their agreement, such increments shall not be averaged up as an alternative method of payment calculation.

g. "Room" shall mean a living room, dining room, kitchen and bedrooms within a dwelling. It shall not include a dining area or eating area which is located within or as part of another room.

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22-2 RENT INCREASE CALCULATIONS

22-2.1 *Rental Increases*

a. Subject to the provisions of vacancy decontrol set forth in subsection 22-2.6, allowable rent increases for all rental units falling within the Borough's rent leveling ordinance shall be determined as set forth herein.

b. At the expiration of a period of not less than 12 consecutive calendar months following the effective date of the last rental increase, a landlord may receive an increase in the rent for such rental unit not to exceed six (6) percent of the prior base rent. A capital improvement surcharge shall not be considered as rent for the purpose of calculating the base rent.

c. Notwithstanding paragraph b. above, the maximum increase in the rent for any rental unit which may be charged to a qualified senior citizen or disabled person whose total household income, from all sources, earned and/or unearned, does not exceed $50,000 per year, shall be limited to three percent (3%). The definition that shall be used to determine qualification by a senior citizen or disabled person is the definition utilized to determine protected tenancy status pursuant to the "Senior Citizen and Disabled Person Protected Tenancy Act" (N.J.S.A. 2A:18-61.22, et seq.), as hereinafter modified:

> (1) "Senior Citizen Tenant" means a person who is at least 62 years of age, or the surviving spouse of such a person if the person should die, and the surviving spouse is at least 50 years of age, provided that the building or structure has been the principal residence of the senior citizen tenant or the surviving

spouse at least one (1) year immediately preceding the death or that the building or structure is the principal residence of the senior citizen or the spouse under the terms of a lease for a period of more than one year.

(2) "Disabled Tenant" means a person who is totally and permanently unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, including blindness, or a person who has been honorable discharged or released under honorable circumstances from active service in any branch of the United States Armed Forces and who is rated as having a 60% disability or higher as a result of that service pursuant to any federal law administered by the United States Veterans Act. For the purposes of this subsection "blindness" means central visual acuity of 20/200 or less in the better eye with the use of corrective lens. An eye which is accompanied by limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered as having a central visual acuity of 20/200 or less.

d. The Borough's rent leveling Administrator is hereby empowered with the authority to hear and determine all applications or disputes regarding qualification as a senior citizen or disabled person.

22-2.2 ***Landlord to Register with Rent Board.*** Every landlord shall register with the rent board and provide the following information:

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a. Name and address of owner, including all partner's names and if a corporation, name of registered agent;

b. Name and address of a managing agent, if any;

c. Number of rental units;

d. Rent being charged for each rent controlled unit;

e. Number of tenants residing in each rent controlled unit;

f. Age of building.

Failure of any landlord to register in accordance with the provisions of this subsection at least six months prior to seeking any relief under this chapter, including but not limited to a rent increase or capital improvements increase, shall preclude the landlord from obtaining any such relief. In addition, any landlord failing or refusing to register in accordance with the provisions of this subsection shall, be subject to penalties as hereinafter provided.

22-2.3 ***Rent Increase Notification.*** Any landlord seeking a rent increase for a rent controlled unit shall notify the tenant by certified mail or personal service and the rent leveling board of the calculations involved in computing the increase. In furtherance of this subsection, the rent leveling board may, by rule or regulation, prescribe a form or forms to be employed by the landlord in complying with the provisions hereof.

22-2.4 ***Multiple-Year Lease.*** Nothing herein shall be construed as preventing a landlord and a tenant from entering

into a lease for a period in excess of one year. A multiple-year lease may provide for an increase in a subsequent calendar year; provided, however, than any subsequent rental increases on rent controlled units shall not exceed six percent (6%) for the subsequent calendar year for which an increase is provided or three percent (3%) in the case of a qualified senior citizen or disabled person.

22-2.5 ***Excessive Rental Void.*** Any rental charge in excess of that authorized by the provisions of this chapter shall be void.

22-2.6 ***Permanent Vacancy Decontrol***

a. In the event that any rental unit, as defined under the borough's rent leveling ordinance, shall become vacant, on or after the effective date of this ordinance, the rental unit shall no longer be subject to the provisions of this ordinance and the landlord shall thereafter be free to rent said dwelling unit at a rental price mutually agreeable between landlord and tenant.

b. For the purposes of this section, a vacancy shall be defined as a voluntary termination of the tenancy by the tenant or an eviction pursuant to the effective provisions of the laws of the State of New Jersey dealing with the landlords and tenants. The existence of such vacancy shall be determined in any case by a court of competent jurisdiction. A cooperative proprietary lease shall not be construed as a lease for purposes of this ordinance.

c. In the event a tenant vacates housing space in order to occupy other housing space within the same building, subject to the notice provisions of paragraph d below, the vacant dwelling shall qualify for permanent vacancy decontrol by the

base rent in the housing space to be occupied cannot be increased more than fifteen (15%) percent from the prior base rent.

d. Notwithstanding anything herein contained to the contrary, within 60 days from the date a rent controlled unit becomes vacant, the landlord shall file with the rent leveling board a notice indicating the number or designation of the unit and the date the unit becomes vacant.

e. The provisions of this section shall be applicable to all rental units. It is the express intention hereof that all rental units shall be provided permanent vacancy decontrol.

22-2.8 ***Capital Improvements***

a. Notwithstanding anything herein contained to the contrary, a landlord shall be entitled to a rental increase to recapture the cost of any capital improvements, including capital improvements specifically required by local, State of Federal law or regulation. The landlord shall be permitted to recover the actual cost of the capital improvements, as additional rent, prorated over seven (7) years, provided, however, that the maximum rent increase that may be charged on a rent controlled unit shall not exceed fifteen percent (15%) of the base rent, inclusive of all permissible increases. For the purpose of this section the actual cost of capital improvements shall include any interest or debt service incurred or paid by the landlord in connection with the financing of the capital improvements. A capital improvement surcharge shall not be considered as rent for the purpose of calculating the base rent.

b. In order to be entitled to recapture the cost of capital improvements the landlord shall, prior to commencement of the

capital improvement, submit to the rent leveling board for pre-approval any and all construction data and financing documents related thereto to confirm the cost of the capital improvements, interest and debt service, together with a copy of the rent roll and a calculation sheet setting forth the rent increase proposed for rent controlled units. The rent leveling board shall approve or deny the application for pre-approval within 45 days of submission of the application. In the event the rent leveling board fails to respond within said 45 day period, the pre-approval application shall be deemed to have been approved. Copies of canceled checks or proof of payment to confirm the actual cost of the capital improvements shall be submitted to the rent leveling board upon completion of capital improvements.

c. For the purpose of this subsection the total cost of the capital improvement shall be calculated and allocated pro rata for the entire building, based on the total number of rooms, and the amount to be charged to each rent controlled unit shall be calculated based on the per room charge multiplied by the number of rooms per rent controlled unit.

d. In the event the rent controlled tenant's pro-rata share of the cost of capital improvements, interest and/or debt service charges are not recovered within the seven (7) year period provided above, the Landlord shall be permitted to charge and collect the balance of the capital improvements passthrough until the total amount apportioned to the rent controlled unit is collected, provided, however, that the maximum rent increase for any year shall not exceed fifteen percent (15%) of the base rent, inclusive of all permissible increases and such increases shall not take effect until the renewal date of a one year lease or the anniversary date of a multiple year lease.

e. Nothing herein contained shall be construed to prevent the tenant, at the tenant's option from making any interior improvement at the tenant's own cost and expense in the tenant's housing space, provided that such improvement and/or installation of appliance is compatible with the amenities already present in the housing space and provided further that such improvements shall thereafter become the property of the landlord, and provided further that the landlord shall approve such improvement which approval shall not be unreasonable withheld.

22-3 ADDITIONAL SERVICES INCREASE

22-3.1 ***Personalized Services.*** With regard to units subject to rent control, where a tenant requests in writing the replacement of a capital item in the tenant's unit with new equipment rather than replacement equipment, or where the tenant or landlord requests that the rental to be charged be in excess of that allowed pursuant to the provisions of this chapter by virtue of personalized services, furnishing, furniture, equipment, facility, alteration, improvement or other special addition to their housing space, or by virtue of the granting of an option to purchase the unit, for which the landlord and tenant have negotiated a mutually satisfactory agreement as to price and terms of payment, the landlord must submit a copy of the proposed lease (including the provision regarding the specialized service or option to purchase) and a signed statement of consent by the tenant to the board for its review and its prior approval.

22-3.2 ***Capital Improvements Limited to One Unit.*** If a rent controlled tenant consents in writing to a capital improvement within the tenant's own housing space, which capital improvement benefits only that particular unit, the landlord may

recover the cost of the capital improvement in accordance with the provisions of subsection 22-2.8.

22-3.3 The amount calculated and charged for personalized services and/or capital improvements limited to one unit shall be in addition to the common area capital improvements passthrough authorized in subsection 22-2.8.

22-3.4 The borough shall have the right to conduct a hearing, call witnesses, require certified documentation and/or expert testimony concerning the value of the personalized services, option to purchase, additional amenities and/or concessions being offered by the landlord.

In the event than any party files a complaint to the board with regard to any lease contemplated by this section which has either been disapproved by the board or has not been previously approved by the board, for a determination that the rental being charged is in violation of the provisions of this chapter, the tenant shall be entitled to a rollback of the rental in accordance with the maximum rental provisions allowed pursuant to other provisions of this chapter.

Except as otherwise permitted by this ordinance, the fact that the parties voluntarily entered into an agreement not approved by the board or not submitted to the board for prior approval shall not be a defense to such a complaint.

22-4 BOARD CONSTRUCTION; POWERS AND DUTIES.

22-4.1 ***Board Continued.*** The rent leveling board as heretofore constituted is hereby continued. The members

currently serving on the board may continue to do so until their term expires and until their successors shall have qualified.

22-4.2 ***Members Appointed; Term.*** The board shall consist of seven members appointed by the mayor with the advice and consent of the council, all of whom shall serve without compensation, and at least one of whom shall be a landlord or the managing agent of a landlord and one of whom shall be a tenant and one of whom shall be a homeowner and one of whom shall be a resident owner of a co-operative or condominium apartment. Upon the expiration of the term of any member, the mayor, with the advice and consent of the council, shall appoint a citizen for a term of three years. Vacancies occurring in the board shall be filled by the mayor with the advice and consent of council for the unexpired term only. A member of the board shall be removable for cause by the governing body upon written notice and after public hearing thereon.

The board shall reorganize annually and elect a chair person. The board shall not elect a chair person for each year until after the completed reorganization of the board and after each of the new appointments shall have been seated and qualified. The intent of this paragraph is to assure that all new appointments have the right to vote for a chair person during the initial year of their appointment.

22-4.3 ***Powers and Duties.*** The board is hereby granted, and shall have and exercise, in addition to other powers herein granted, all the powers necessary and appropriate to carry out and execute the purposes of this ordinance including but not limited to, the following:

a. To issue and promulgate such rules and regulations as it deems necessary to implement the purposes of this chapter,

which rules and regulations shall have the force of law until revised, repealed or amended from time to time by the board in the exercise of its discretion, provided that such rules and regulations shall be adopted by the mayor and council within 90 days from receipt thereof. In the event the mayor and council fail to adopt said resolution within 90 days, the rules and regulation shall be deemed to be approved by the mayor and council in the form submitted.

b. To supply information and assistance to landlords and tenants to help them comply with the provisions of this chapter.

c. To enforce the provisions of this chapter and to initiate proceedings in the municipal court for willful violations thereof.

d. To issue subpoenas to compel the attendance of witnesses and the production of books and records in connection with hearings held pursuant to the provisions of this chapter.

The board shall give both landlord and tenant reasonable opportunity to be heard before making any determination.

22-4.4 ***Appeals to Governing Body***

a. Any determination of the board may be appealed by an affected landlord or tenant to the governing body. The appeal shall be made in writing and filed with the borough clerk within 20 days from the receipt of the board's determination and shall set forth the specific basis for the appeal. The appellant shall deliver a copy of the notice of appeal by certified mail or personal service to each affected party.

b. The governing body may thereafter hold a hearing on the appeal, which hearing shall be de novo unless a transcript

or stipulation of facts is supplied. In the event the governing body does not hold a hearing on the appeal within 60 days of the filing of the appeal, the determination of the board shall be deemed affirmed.

22-5 RESPONSIBILITIES OF LANDLORD

22-5.1 ***Maintain Standards.*** During the term of this chapter, the landlord shall maintain the same standards of service, maintenance, furniture, furnishings and equipment in the housing space and dwelling as the landlord provided or was required to do by law or lease on the date the lease was entered into. Any violation hereof shall subject the landlord to punishment under section 22-8 hereunder.

22-5.2 ***Anti-Harassment Provisions***

a. Any conduct, direct or indirect, committed by landlord, or anyone on his behalf, which results in the harassment of a tenant, including, but not limited to, a reduction of services, bothersome telephone calls or letters, bell ringing, frivolous eviction threats or legal proceedings shall be unlawful and shall constitute a violation of this chapter. A complaint for this violation can be brought in the Fort Lee Municipal Court and must be filed within 90 days of the alleged act of harassment.

b. Upon a finding that a landlord was guilty of harassment under this act, the court shall impose a fine of up to one thousand ($1,000.00) dollars per act of harassment with minimum mandatory fine of one hundred fifty ($150.00) dollars for a first offense; three hundred ($300.00) dollars for a second offense and five ($500.00) dollars for each subsequent offense. Each day or part thereof of such harassment shall constitute a separate

offense for the purposes of this section. In addition the court may impose any one or more or parts of the following penalties:

1. A forfeiture of prospective rent increases on the unit in question for a period of three years.

2. Reimbursement to the aforesaid affected tenant of up to six months rent.

c. Landlords shall distribute to all current and future tenants a notice reciting the entire anti-harassment laws of the Borough of Fort Lee.

22-5.3 ***Increase Must Be Authorized.*** No Landlord shall after the effective date of this chapter charge any rents on rent controlled units in excess of what he was received before the effective date of this chapter except for increases as authorized by this chapter.

22-6 REPEALER CLAUSE

The provisions of any existing borough ordinance which are inconsistent with the above amendments to the rent leveling ordinance are hereby deemed repealed. The provisions of the within amendments shall not have a retroactive effect. All provisions of the existing borough ordinance which are not inconsistent herewith shall continue to be in full force and effect.

If any one clause or portion of this chapter shall be determined to be unenforceable or unconstitutional, the unaffected portions of this chapter shall remain in full force and effect.

Appendix C

22-7 SCHEDULE OF FEES

22-7.1 ***ESTABLISHED.*** There is hereby established the following schedule of fees for complaints and applications to the board which fees shall be payable to the tax collector of the borough.

Complaint filing fee	$ 20.00
Landlord application for increased rental due to capital improvement	100.00

22-8 VIOLATION AND PENALTY

A violation of any provision of this chapter including but not limited to the filing with the rent leveling board of any misstatement of fact, shall be punishable as follows:

a. For the first offense by landlord, by a fine of not more than five hundred dollars ($500.00);

b. For the second offense, and for each subsequent offense by the same landlord, by a fine of not more than five hundred dollars ($500.00), or imprisonment for a period not to exceed thirty (30) days, or both. In addition, upon conviction for a second or subsequent violation, the landlord shall pay, as a penalty, an amount equal to any and all rent increases over the prior year's base rent, collected from the tenant occupying the unit which was the subject of the violation during the year or years in which the violation occurred, which penalty shall be dived equally between the tenant and the Borough.

c. A violation affecting more than one leasehold shall be considered a separate violation as to each leasehold, and the penalties shall be imposed accordingly.

22-9 CONSTRUE CHAPTER LIBERALLY

This chapter, being necessary for the welfare of the borough and its inhabitants, shall be liberally construed to effectuate the purposes thereof.

22-10 APPOINTMENT OF ATTORNEY

The mayor and council reserve and retain the right to annually appoint an attorney to represent the rent leveling board and set his or her salary.

22-11 SENIOR CITIZEN AND DISABLED PERSON STATUS

22-11.1 *Qualification for Eligibility for Senior Citizen and Disabled Person Status*

a. All persons seeking to qualify as senior citizen or disabled person shall complete application forms provided by the rent board.

b. The determination as to eligibility shall be made by the administrator of the rent leveling board and is appealable to the rent leveling board within 30 days. The decision of the rent leveling board shall be final.

c. Hearings by the rent leveling board on such appeals shall be held in closed session, with only the affected landlord and

tenant and their agents in attendance. All data utilized at such hearing shall be held in strict confidence at the request of the tenant.

d. Once a tenant obtains initial eligibility, said tenant must certify at the expiration of every two years thereafter as to his/her continued eligibility. Such certification forms shall be provided by the rent leveling board.

e. Said certification must be completed by an eligible tenant not less than three months prior to lease renewal or annual rent increase.

f. For good cause shown, a landlord may apply to the rent leveling board for a hearing on the question of a tenant's eligibility at the anniversary date of such tenant's eligibility after the initial two year period of eligibility.

22-12 FEES FOR ADMINISTRATION OF THE SENIOR CITIZENS AND DISABLED PROTECTED TENANCY ACT

22-12.1 ***Administrative Agent.*** The administrator of the rent leveling board shall serve as the administrative agent for the Borough of Fort Lee to administer the Senior Citizens and Disabled Protected Tenancy Act.

22-12.1 ***Conversion Fee.*** The landlord/sponsor of each rental unit converted to a condominium or cooperative after the effective date of the Senior Citizens and Disabled Tenancy Act shall provide sufficient postage and forms for certified mailings and pay fees in accordance with the schedule listed herein.

Appendix C

Initial Filing Fee - Building or Project

Less than 50 units	$125.00
Less than 150 units	225.00
Less than 250 units	325.00
250 units or more	425.00

Application Processing Fee-Initial and/or Continued Eligibility
$35.00 per application

22-12.3 ***Appeals Board***

a. There is hereby established an appeals board, which board shall hear and determine appeals from decisions rendered by the administrative agent under and pursuant to the Senior Citizens and Disabled Protected Tenancy Act.

b. The appeals board shall be composed of three members of the rent leveling board to be chosen by a majority of the rent leveling board. Said persons shall serve without compensation. The terms of each member of the appeals board shall be for one year or until the end of the calendar year, whichever shall first occur.

c. A filing fee of seventy-five ($75.00) dollars shall be paid by each appellant and said fee must be made at the time the appeal is filed.

APPENDIX D — EXCERPTS OF TRANSCRIPT OF TRIAL TESTIMONY OF KENNETH K. BAAR BEFORE JUDGE POLITAN DATED OCTOBER 15, 1996

[commencing at page 186]

Baar - cross

. . . that vacancy rate there is not — there could be a housing shortage of low and moderate income rental units.

When you say "use that," I was more thrust in — my comment is that basically you could have a substantial vacancy rate and still have this type of shortage. I wasn't picking on 6.8 percent or five percent or nine percent.

Q Is there an accepted standard as to what percentage vacancy rate constitutes a housing shortage?

A Well, I think that historically it has been common that the five percent figure has been used which Professor Wachter cited. But I think that recent analysis has shown that you could have a high vacancy rate and still have a shortage of affordable housing because of other factors.

Q You talked about the shortage of affordable housing. In other words, there is not a housing shortage generally in the Borough of Fort Lee. There is a shortage of affordable housing?

A When I say "affordable," I mean at low and moderate. Rents that low and moderate income households can afford.

Q There is not a general housing shortage. There is a shortage that low and moderate income renters could afford? Is that right? That is your opinion?

A Right. But let me clarify that.

We're talking about vacancy rates. If the rents were raised hypothetically — I'm not saying this would happen — to 2,000 a month, the vacancy rate might go up to 80 percent. That . . .

* * *

[179] Baar - cross

Q When you're comparing the bottom third to the median rent, you're comparing the bottom third to the middle of the rent charge, is that right?

A That's correct.

Q How is that in any way valid?

A Well, I think it is very important because, first of all, if you don't have rent control, the rents for this bottom third can move up to the median rent. If you have — if you have vacancy decontrol, it could move up to $1,000 a month.

So I'm looking at these average rents to show what the market would do if there were no rent regulation, what would happen to the rents of these people in the lower rent units.

Q So you're looking at the average rents to find, but you're not looking at the average renters? You're looking at the bottom third?

A I'm looking at the impact of the average rents or vacancy rents on this lower third income group.

Q How many of that bottom third live in the subsidized housing that is available in Fort Lee?

A I said there were — mathematically, there are 2,000 in this bottom third. The testimony I've heard indicated there were 300 subsidized units in the city.

Q 398?

A 398.

Q From that you conclude that all of the bottom third is . . .

* * *

[153] Baar - direct

THE COURT: If you keep the rents low?

THE WITNESS: Yes.

THE COURT: Ultimately, it will attract individuals with lower or moderate levels of income?

THE WITNESS: Right.

THE COURT: But in the first instance, in creating affordable housing, do you not target a market — you target people who earn, let's say, $25,000 per year, $20,000 per year, whatever?

THE WITNESS: Right. Okay.

THE COURT: If there is a distinction. If there is not, feel free to disagree with me.

THE WITNESS: In a sense, you target.

The problem is if you wrote a rent control law and said that it only applied to low and moderate income tenants, the problem is then landlords would rationally turn around and discriminate and say: I only want to rent to high income tenants.

So, therefore, the law has to regulate the rents. It can't regulate what tenants are covered by the law because it would lead to this whole discriminatory effect.

THE COURT: Rent control does not take into account, per se, the income level of the prospective tenants, does it?

THE WITNESS: No. One exception, but no.

THE COURT: What is the one exception? Subsidized . . .

* * *

[198] Baar - cross

. . . of them which never had rent control. It is unlikely that they ever will and they didn't have any apartment construction and there were very, very tight land-use restrictions. So here's one factor. There are all these factors that come into play.

My response is rent control is not the central factor in this.

Q Let's come on back to Fort Lee. In Fort Lee there has been no construction of rental buildings since this law took effect in

Appendix D

1987 that would allow somebody to be exempt from rent control for a new building, right?

A Right. My understanding is there is one application in the pipeline now for 300 units.

Q That is an application in the pipeline. I asked you about built?

A Okay. I guess that is — okay.

Q None built. Like brick, mortar, windows, steel. That kind of stuff up there. You can see it.

A That is what I've been told.

Q Nada, zero, right?

A Right.

Q Do you know of condos that are listed for sale in Fort Lee that have not been sold?

A I've been told there is a significant number.

Q In fact, aren't many of the condo owners losing money every month between the rent they collect and the money they have to . . .

* * *

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[166] Baar - direct

THE COURT: What about vacancy decontrol now?

THE WITNESS: That was coming next.

THE COURT: Good.

A What happens is in a vacancy decontrol situation, even though it is illegal to harass the tenant — in the real world if a tenant is sitting in a unit and paying $600 a month and the landlord knows if they leave the rent can go to $900 or whatever, it is going to affect how much the landlord wants to maintain the unit.

There have been studies in New York, especially in New York, showing landlords like to reduce the maintenance if they can get a lot higher rent if the tenant will leave. It is an incentive for harassment to get the tenant out beyond just wishing the tenant would leave.

So I think vacancy decontrol does affect the sitting tenant as well as the future affordability of the unit.

THE COURT: Would that equally apply with the same rational to the condo and cooperative units up there that have vacancy decontrol and the three — I guess the three- and four-family units that do have vacancy decontrol?

THE WITNESS: Well —

THE COURT: The same kind of harassment could occur, can't it?

THE WITNESS: I'd say yes. I'd say — it is likely that there could be some difference in degree.

[167] A lot of the condos and co-ops are in individual ownership, which means they — not always, but they individually chose the tenants as opposed to an owner who is dealing with 130 tenants. I think you have more of a personal relationship and, therefore, less likelihood of harassment.

I'm not saying there would be none in one situation and a lot — it would all exist in the other situation. We do have a personal type of relationship.

THE COURT: In other words, you do less harassing if you own one as distinguished from 130?

THE WITNESS: Right. I'm not saying that is always true.

THE COURT: I understand what you're saying, Doctor.

Go ahead.

BY MR. SCANDARIATO:

Q Are there any other differences pertaining to a professional landlord or a large landlord as opposed to a smaller landlord or the owner of a co-op or condominium unit?

THE COURT: Before you do that, if someone were a multiple owner who owned a large rental unit and owned, say, three or four condo units or co-op units next door, I take it the same equal motive would apply to both, would it not? If he's an evil man, he's an evil man?

THE WITNESS: Okay. Yes.

THE COURT: I'm sorry. I didn't mean to interrupt. . . .

* * *

[176] Baar - cross

We heard the testimony last week that — some of the parties who have testified said a substantial part of their units have been vacancy decontrol.

Q Do you know the income of those tenants, the units that have not been vacancy decontrolled?

A No. The Census data doesn't break it down that way.

Q And you don't know?

A That's correct.

Q You don't know the income of those tenants who live in units which have been vacancy decontrolled, do you?

A No. That's correct. I'd imagine it would be higher because the rents have been increased very substantially.

Q Higher than what?

A Higher than otherwise would be and higher than the overall tenant population in the city.

Q Why would you conclude that?

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A I don't think — my analysis of the data I collected, and also the testimony we heard, indicated that units were now going for a thousand dollars if they became vacant, if they could be raised to market, if they were vacancy decontrolled. And I don't think it is likely that tenants that have an income of 130,000 or so would likely rent those units.

Certainly tenants, with a income under $20,000 a year is not likely to rent for $1,000 a month.

Q I'm asking — you said earlier that the income of the . . .

* * *

[174] Baar - direct

MR. HARRIS: A physical need.

THE COURT: Then I'll give you the time.

MR. HARRIS: Thank you.

(Recess.)

THE COURT: We have cross by Mr. Harris.

MR. HARRIS: Thank you, your Honor.

THE COURT: You're welcome

All set, Mr. Baar? Everything okay?

THE WITNESS: Yes.

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CROSS-EXAMINATION

BY MR. HARRIS:

Q Dr. Baar, my name is David Harris. We've met earlier.

Dr. Baar, did you conduct any factual investigation as to the income of the tenants in Fort Lee?

A No. I relied on the Census data.

Q That is from 1990?

A That's correct.

Q Does that Census data provide any information as to the income of renters in rent control apartments?

A No. The Census data looks at all the rental units.

Q Does it break it down to tell you — in fact, it doesn't break it down to tell you how much the renters of rent control apartments are earning, does it?

A No. When you talk about — all the units — almost all the units are rent controlled in the city. . . .

* * *

[182] Baar - cross

. . . as a problem over and over under rent control.

Q Maybe I should state my question differently.

Let's look at the 440 Company/The Carriage House. That building has the highest number of decontrolled rents of all of the buildings in the fund. There was testimony there were 220 out of the 298 units are decontrolled.

Do you have any evidence that 440 Company harassed its tenants to cause them to leave so that it could raise the rents upon their vacating those apartments?

A Okay. No. I mean, the thrust of my analysis in that I was looking at rational basis. I was looking at rational basis for policy.

Harassment is a serious problem under rent control. I didn't do a study of specifically was there harassment in this particular building.

Q So the answer is no?

A That's correct.

Q Do you have any evidence that there was any harassment in the Crystal House, which is a building that is almost half decontrolled?

A No. I didn't specifically study that building.

Q Do you have any evidence that there was any harassment that caused the tenant to leave any of the apartments that have become decontrolled since 1988 in the Borough of Fort Lee?

A No. Because I was looking at the general problem. I wasn't [183] doing an empirical study of harassment, which would be very, very hard to do.

Q You don't have an empirical study; you don't have anecdotal evidence; you don't have any evidence of any harassment from any of these apartments that came decontrolled in the Borough of Fort Lee since 1988, do you?

A You mentioned "anecdotal evidence." Certainly, the tenants have indicated this was a serious problem.

Q You interviewed tenants?

A Yes.

Q Which tenants have told you they were forced to leave their apartments?

A They haven't told me they were forced. They said that harassment is a problem.

Q What kind of harassment?

A Affecting — they've talked about heat. They've talked — basically, they've talked about the general problem of harassment. Heat, maintenance.

Q Heat and maintenance?

A Yes.

Q Have forced them to leave?

A Yes. It has been encouragement for some tenants to leave.

Q In the heat and maintenance of a building that is half decontrolled and half controlled, how do you deny heat and maintenance to the controlled half of the building? . . .

* * *

[180] Baar - cross

. . . living in the subsidized units?

A I don't know if there is a one-in-one relationship. I imagine a percentage of them — a substantial percentage of the subsidized units have lower income households. I'm not sure about that.

THE COURT: But there are regulations which provide that you can't get into those subsidized units unless you met a threshold, a low threshold of income, right?

THE WITNESS: Right. The only thing I wasn't sure — if their income went up, whether they'd have to move out.

THE COURT: I guess — maybe their rent is based upon — okay.

Q You also had these theories about what would happen if vacancy decontrol were implemented boroughwide, is that right? You have these theories about landlord harassment of tenants?

A Right. Okay.

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Q According to your report, you base that on the 1972 study of New York?

A Let's say I quoted the 1972 study of New York. But this has been a continuing ongoing problem under rent control where there is vacancy decontrol.

Q You're a person who believes in studying empirical data as opposed to using economic theory, isn't that true?

A Well, I'd say both are relevant in different situations or have varying degrees of relevancy. I don't say economic theory [181] doesn't exist. I don't feel that only empirical data exists. These are complicated issues.

Q Isn't it true that you have in 1989, in the Brooklyn Law Review, wrote an article, "Would the Abolition of Rent Control Restore a Free Market"?

And in your response to an article earlier by Epstein, did you say that "Empirical data is what we need to look at rather than economic theory"?

A That's correct. I say that. There is a response to the fact that the articles in this publication were totally theoretical. I was discussing the impact of rent control on new construction.

Q Let's look at the empirical data in the Borough of Fort Lee as opposed to your economic theory based on your 1972 article. Is there any evidence of tenant harassment that resulted in the vacancy rates that we've seen in this case?

A Okay. I didn't — the vacancy rates I said was primarily the

result of profit maximization. Basically, it was more profitable to hold the unit off the market or take six months to rent something at $1,000 a month as opposed to rent it at $700 a month and rent it immediately.

In response to that, what I understand is the other part of your question, has there been imperical study of harassment. I don't know of such a study. It is very hard to document. There has been a threat of it and it has been raised . . .

* * *

[184] Baar - cross

A Well, maintenance — certainly, the owners have the control over the maintenance of individual units.

Q Do you have specific examples of this?

A Well, I would say as a general proposition that owners control the maintenance of their units.

Q No. I asked you: Do you have specific examples of maintenance being denied to a specific tenant?

A No.

Q You talked about rents being doubled when decontrolled. At the allowable five percent increase, how long would it take the rent to double?

A You'd have to compound it. It wouldn't take 20 years because you're compounding the —

Q Of course, you're compounding it. How long would it take?

A I would have to use a calculator. I would guess 15 years. Take five percent compounded annually. I don't know how many years.

THE COURT: We need an actuary here.

Q If it were two percent, it would take 15 years?

A It would take more than that.

Q At two percent. Compounded?

A Two percent — you're saying two percent a year compounded in 15 years would be equal to 100 percent?

Q Right.

A Well, if you have a table that shows that. I wouldn't have . . .

* * *

[201] Baar - cross

Also, there are some comments on the next page that look at the rents of vacant units. Actually, I would look at the table on the next page.

Q I want to look at the part you are referring to. You say it says in here "Observers felt the high rental vacancy rate in 1990 was caused by a large number of luxury units which were available for rent rather than the availability of affordable rental units."

A That's correct.

Q That is what observers felt?

A Right.

Q Did you leave that part out; that the basis of that conclusion was the feeling of observers? Did you leave that out of your report?

A I don't know. I certainly read it in my testimony right now — I mean earlier.

Q It says here that the part that was — you just pointed to, it says "However, very few were affordable."

The previous sentence says "That was one part of the reason since 911 of the 6,763 vacant units for rent were condominiums. However, very few were affordable."

So isn't the report referring to the 911 units that were condominiums that were not affordable?

A Well, I think that particular sentence is. But I think the earlier parts refer to the rental market in general. Because [202] earlier in the passage they talk about "The high rental vacancy rate in 1990 was caused by a large number of luxury units which were available for rent rather than the availability of affordable units."

Then on the next page there are comments about the lack of affordable units. At one point they talked about very low income unit renters. They say ". . . when analysis is made for vacant units for rent, the situation becomes nearly hopeless."

Appendix D

Q The first part you read was — again, you left out "the observers felt."

A Okay. I don't remember whether I read that in the testimony. I thought I did. It certainly says that.

Q You talked about the feeling of observers?

A Okay.

Q Now, you refer in your report to the Supreme Court case regarding the San Jose Rent Control Ordinance?

A Yes. That's correct.

Q You cite the other three factors; consumer welfare, prevention of dislocation and keeping tenants from having their rents raised above the level they could afford. Is that right?

A Right.

Q Now, the Rent Control Ordinance that the Supreme Court had before it wasn't a blanket control of an apartment unit without consideration of the financial circumstances of the landlord and the financial circumstances of the tenant, was it? . . .

* * *

[211] Baar - cross

My question to you, Doctor, if I might ask you this one little question.

Appendix D

Apparently, at some point in the history of Fort Lee, a window of opportunity was opened up for these units to be decontrolled, one-time decontrol. You're familiar with that?

THE WITNESS: Right.

THE COURT: How do you explain all of that?

THE WITNESS: How do I?

THE COURT: How do you explain that?

How does that relate to your whole theory of rent control? All of a sudden, the governing body of Fort Lee decides they'll give a window of opportunity for two or three years. Whatever it was.

Doesn't that destroy everything you're talking about on maintaining a group of apartments which are available for, quote, medium and low income people in the affordable housing area?

What they did is in one fell swoop they said there is vacancy decontrol for a period of five years and took a whole bunch of apartments right off the affordable market and put them in this, quote, luxury market.

THE WITNESS: Right. I'd say that substantially undercut the objective that I'm talking about.

THE COURT: Do you think if the Borough of Fort Lee or any other borough can play helter-skelter with people's lives . . .

* * *

APPENDIX E — EXCERPTS OF TRANSCRIPT OF TRIAL TESTIMONY OF SUSAN WACHTER BEFORE JUDGE POLITAN DATED OCTOBER 15, 1996

[commencing at page 104]

Wachter - direct

. . . rather soft today.

Q Dr. Wachter, when were you retained by 440 Company?

A In the summer of 1993.

Q What were you asked to do?

A I was asked to analyze rent control and its effects on the overall housing market in Fort Lee and to — also, its impact on those units singled out for rent control in the strictest form.

Q What data did you look at?

A I looked at data from the U.S. Government, from Census. I looked at data from the Borough of Fort Lee which included data from assessors, from the escrow fund maintained by the — escrow fund data and also data from the Rent Leveling Board.

Q What analysis have you performed of that data?

A I performed three types of analysis. The first was I looked at housing supply and demand.

Second, I looked at composition of housing within Fort Lee.

And, third, I looked at rental trends in Fort Lee.

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Q Did you come to any conclusions as a result of your analysis of these data?

A Yes, I did.

Q Can you tell the Court what they were?

A I concluded that there was no housing shortage in Fort Lee, that rents were stable in Fort Lee, and that rent regulation as practiced in Fort Lee has had no noticeable impact — no . . .

* * *

[126] Wachter - cross

. . . quickly. There is no strategy such as that in a non-monopoly competitive market. It cannot work that way.

Q What was that finding based on? What data?

A There are a number of rental units, a number of rental owners, ten buildings in the fund, there are 109 buildings overall. There is no monopoly possibility with so many units.

Q Based on information given to you by the plaintiffs?

A Well, if you're telling me there are fewer than 109 building owners, property owners, you're telling me there are three property owners in the Borough of Fort Lee or in total — and I'm saying here not just rental, but substitutes for rental, condos and co-ops — then we can start speaking about monopoly.

My understanding is there are 5,000 condo and co-ops.

Appendix E

These are not in the hands of — along with the rental, in two or three owners. There is no monopoly. There is no oligopoly, which is three or fewer owners of more than 50 percent of the stock in the market.

THE COURT: You said "oligopoly"?

THE WITNESS: Oligopoly.

THE COURT: What does that mean again?

THE WITNESS: Oligopoly — monopoly is one owner. Oligopoly is perhaps three. It means few.

So they include — you need them to include — you need them get together or send signals to each other.

You can't really have strategies of pushing market . . .

* * *

[112] Wachter - direct

A It is, indeed, the vacancy decontrol in the period of 1988 to 1993 which allows the market rents to be re-established.

Undoubtedly, that is a big part of why rent control in a strict form is not affecting rents; because they've already been brought up to market in the vacancy decontrol period of 1988 to 1993.

Q You said those rents were lower than the rent control rents. What do you mean by that?

A I mean that the market — well, the market will not allow rents since then, in the period of — well, in the period since then, when units would roll over into the escrow fund, the market would not allow for most units to, indeed, achieve a rent which would be equal to the allowed rent control rent.

So the market, itself —

Q They couldn't increase them five percent over the market?

A That's right.

That is, in fact, the third part on what I looked at in my analysis. I looked at what happened to rents in the period of the escrow fund. That is historical data. We have that evidence.

We have the evidence of what happened to rents in the period since the escrow fund was established in 1993. And rents have been stable. It is a stable market.

THE COURT: What are you studying in that period from October '93 to October '97? What are you studying? How many . . .

* * *

[119] Wachter - direct

If you have a decrease in appraised value, then the tax base is lower. If the budget is constant, then you have to increase the effective tax rate on other taxable properties within Fort Lee.

So the conclusion follows that the owner-occupants of

housing are going to find themselves under a higher tax burden than otherwise.

Q Now, you have mentioned in an early part of your testimony there are no positive effects by this strict form of rent control. I would ask you, did you take into consideration the affordability of housing?

A Yes, I did.

Q Why isn't the affordability of housing a positive impact of rent control?

A Well, affordable housing is — if you have to — in order to know how affordable housing is, you must compare housing rent to the income of the household.

The housing that is under rent control in Fort Lee in theory and looking at the testimony, some evidence, this is not — this set of regulations does not increase affordable housing. What it does is increases the amount of cheap housing.

But if the household in the housing has an income of, let's say, $100,000, this is not affordable housing. It is — rent control does not translate to affordable housing. Rent control translate to lower priced housing than otherwise. But . . .

* * *

[116] Wachter - direct

. . . buildings.

Appendix E

Q For the buildings participating in the escrow fund?

A That is correct.

Q Is it your understanding that those same buildings or at least some of those same buildings have other apartments which are renting at market rents but are not participating in the escrow funds?

A Yes. That is my understanding.

Q What conclusions did you draw from your analysis of the data that you mentioned?

A Well, using a 50 percent cost factor, revenues declined by 13 percent. Assuming costs are 50 percent, that decreases net revenues by 26 percent. So that would be the decline in the building values.

Q Building value would decline by 26 percent?

A That is correct.

Q And in your — first of all, have you actually valued real estate as part of your — as part of your work?

A Yes, I have.

Q Can you give us some examples of what kind of real estate — what kind of properties you valued?

A Yes. I evaluated large condo project in New York City, Manhattan. I've done retail parking for the City of New Rochelle.

I've done commercial buildings in the West. I've done a lot of apartment buildings throughout the United States. . . .

* * *

[107] Wachter - direct

THE COURT: You're going to give me something on that?

THE WITNESS: Well, I was just going to say right now that I just noted there one property had about a ten percent vacancy rate. Another property had something less than that.

THE COURT: Which transcript are you reading from now?

MR. HARRIS: The transcript of the trial.

THE COURT: This trial?

MR. HARRIS: Yes.

THE COURT: Go ahead.

Q I guess the judge is asking you: Is there any more up-to-date data other than the Census data?

A No.

Q You said that there were no positive effects as the result of rent control on the Fort Lee housing market. Is that correct?

A Yes. Based on the information from the analysis of supply and demand, vacancy rates and, in addition, looking at the composition of the housing market.

Appendix E

What I did was I, using Census data, again, found that there were a number — to repeat, 16, 847 units, dwelling units. And of these data from Fort Lee indicates — from the Assessor's office — indicated that there — 1,013 of these were subject to strict rent control.

Q By "strict rent control," what do you mean?

A By "strict rent control," I mean rent control without [108] vacancy decontrol.

Q So all of those units, only 1,013 were subject to strict rent control?

A That is correct. Out of those 1,013 in my study, I found that only 133 were, in fact, impacted by strict rent control, which is one percent — less than one percent of the housing market in Fort Lee.

So, clearly, it could have no impact on the overall housing impact — housing market conditions in Fort Lee.

Q By "no impact," you mean no positive impact?

A That's correct.

THE COURT: This data you are speaking of now, where does this come from, 1,013 and 133?

THE WITNESS: The 1,013 comes from the Tax Assessor of the Borough of Fort Lee. It was provided by Tim Leodoris.

THE COURT: In other words, factually you uncovered in

your investigation there were 1,013 units, I'll call them, that are subject to rent control?

THE WITNESS: That is correct.

If I may go back to the detail?

THE COURT: Sure.

THE WITNESS: According to the affidavit dated October 15, 1993 of Leodoris, there were in 1993 1,799 multi-family housing units which do not fall into cooperative-condo categories. Of those 1,799, 398 were then . . .

* * *

[114] Wachter - direct

. . . second question you were asked to investigate or to study. That being the impact of the strict form of rent control on a small segment of the housing market.

A While rent control is not having impact on the market as a whole, on a select group of properties it has major impacts.

Q What select group of properties?

A Those properties where rent control is strictly enforced, by which I mean no vacancy decontrol. It is only a very small percentage of the properties in Fort Lee that is the case. 1,000 or so.

Q Again, you're basing your 1,000 on the Leodoris certification, which has 1799 units, is that right?

Appendix E

A Right. That's correct.

Q You have looked at the additional information that was provided regarding units of less than four units — buildings with less than four units?

A Yes, I have. Since my original report, we have information of additional units that have participated, including those units with less than four units, buildings with less than four units. In my escrow account analysis, I performed my calculations of the effects of the rent control.

Q Does that additional information affect your opinion in any way?

A Well, in terms of what I've just said, it actually strengthens my opinion because the overall number of units is . . .

* * *

[117] Wachter - direct

. . . I've done all property types.

Q On behalf of what type of organizations?

A Well, I'm on the board of MIG Residential Reach.

So we do about six buildings a year for that.

I'm a consultant for Cushman Wakefield, a consultant for Arthur Andersen, and I also teach appraisal.

Appendix E

Q In your review of the transcript have you found any evidence which confirms or rebuts your conclusions?

A My conclusion on this, reading the transcript, I noticed there was one building that the appraisal declined after rent control was imposed from $12 million to $3 million. That is, of course, a much bigger decrease than the 26 percent. But it doesn't surprise me. I was using very conservative numbers.

What you would expect to happen over time in a rent controlled building is that the expenses would increase as a percentage of rent revenue. So that perhaps it goes as high as 70 percent. In that case a decrease in rent revenue would have a much greater impact on the value of the property, and, therefore, on the appraised value of the property.

Q What impact, if any, does this devaluation of the buildings under rent control have on the overall — the availability of housing in Fort Lee?

A Undoubtedly decreases the availability of the housing in two ways.

First of all, it discourages investment in and [118] reinvestment under strict rent control.

In addition, it discourages the building of new rental properties.

Q In your view of the testimony, have you found any evidence that would confirm or rebut those conclusions?

A Reading through the testimony, it seems to indicate that particularly in those rental buildings where a majority of the

units were under — were participating in the escrow account, there is no new investment.

But in any case, no new investment, it was indicated in the testimony, in those units that were under rent control. This certainly supports lack of investment and reinvestment in those buildings.

Also, there seems to be testimony which accords with the theory that there were no new buildings built for the rental market in Fort Lee since 1973.

Q What impact does your conclusion have on the quality of housing?

A Well, the impact — both theory and evidence would support this — is that the quality on housing deteriorates over time.

Q I'd like to take you onto another aspect of your report.

Can you describe for the Court whether there are any tax consequences to this devaluation in the buildings for the community as a whole?

A Well, it is kind of logical. . . .

* * *

[49] Walsh - direct

BY MR. HARRIS:

Q Mrs. Walsh, of the $207,556.51 in the fund, that represents the difference between what the property owner could have

charged under the Rent Control Ordinance of Fort Lee and the market rent that they did, in fact, charge, is that correct?

A That is what was represented by the participant who was depositing the funds in the escrow.

Q And the number of units in the fund, does that — does that reflect, also, the number of tenants?

A I don't know how to answer that question.

Q The same apartment could have turned over twice?

A That's correct.

Q And that apartment would just remain in the fund?

A That's correct.

Q In terms of the size of the apartment buildings, I said of the ones participating in the fund there are only four apartments which are over 100 units, is that correct?

A That's correct.

Q Have you received in the recent past — have you received inquiry from any property owner who owns less than five units?

A I believe I may have received a phone call from somebody who who had two units, but I am not certain.

Q They had a two-family house?

A Yes.

Q When was that? . . .

* * *

[110] Wachter - direct

. . . multi — what we'll call high rise or multi-family units together with two-family units, is that correct?

THE WITNESS: I' m not sure. These are the units that were in Tim Leodoris' affidavit as to what were. But then later on there was an increase.

But in any case, a critical issue, so as far as I'm concerned in terms of positive effects, is that there only are 133 units that are affected by rent control. Because if the market rent is less than the rent control, the rent control has no impact on these market rents.

THE COURT: We don't know that?

THE WITNESS: By theory, it would work that way.

THE COURT: That is comparing the escrow account versus the thousand figure?

THE WITNESS: That's right.

THE COURT: That is where you get your number?

THE WITNESS: That's true. Now —

THE COURT: People may not very participated in the escrow fund for a variety of reasons.

THE WITNESS: The reasons that I could see why some of them would not participate on the escrow account would be, one, units would become vacant. I'm looking at vacancy rate in the strictest form. No units would come up as vacant.

Secondly, there was no enforcement. Therefore, rent control is not affecting it.

[111] And, three, the rent is beneath the rent control — the market rent is beneath the rent control.

In those three cases rent control isn't affecting these units, it is hard to acknowledge there would be a rent control that would be affected.

THE WITNESS: That may be a law breaker who has a two-family house. Doesn't comply with the law and doesn't exist.

THE WITNESS: And charges —

THE COURT: And charges whatever is in the market?

THE WITNESS: Rent control isn't then being enforced. There may be exorbitant control. Rent control isn't being enhanced.

It is being enforced against 133 market. That cannot affect the overall market because that is less than one percent.

THE COURT: Go ahead.

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BY MR. HARRIS:

Q Dr. Wachter, to be clear about your testimony, there are some buildings where apartments — apartment rents were stepped up between 1988 and 1993?

A Yes.

Q In taking into consideration those units, you said market rents were lower than the rent control rents. Can you tell the Court a little bit more about what you mean by that taking into consideration those apartments that had already been stepped up? . . .

* * *

[141] Wachter - cross

THE COURT: Back to Wharton School of Business.

THE WITNESS: That was the answer.

Q Doctor, you testified that the rent control regulation in Fort Lee discourages the building of new rental property?

A Yes.

Q Are you familiar with New Jersey Statute 2A:42-84.1?

A No, I'm not.

Q If I told you that that statute exempts new construction from rent control for a period of 30 years or for the period of

amortization of the initial mortgage loan, you would have no knowledge of this statute?

A Now that you mentioned what the statute is, I certainly know of that statute. I didn't know it by number. I do know of that statute. It does not change my conclusion.

THE COURT: Why not?

THE WITNESS: Well, banks don't really go by legislation as it appears today. They go by the record of legislation.

Legislation is so filled with changes in laws over time in the Borough of Fort Lee, which moves to stricter legislation, moves backwards and stricter again, it raises the risk. It is called "legislative risk."

This risk is just as important for banks underwriting mortgage lending and just as important for financing as tax risk, as interest rate risk. And Fort Lee has that risk. . . .

* * *

APPENDIX F — EXCERPTS OF TRANSCRIPT OF TRIAL PROCEEDINGS BEFORE JUDGE POLITAN DATED OCTOBER 9, 1996

[commencing at page 66]

Lecour - cross

MR. SCANDARIATO: Nothing further.

THE COURT: If the market will bear it?

THE WITNESS: Yeah.

MR. HARRIS: Mr. —

THE COURT: Whoa.

MR. HARRIS: I'm sorry.

MR. TARELLA: Quite all right.

I have no questions.

MR. HARRIS: I anticipated he would have no questions, your Honor.

THE COURT: All right. Go ahead.

REDIRECT EXAMINATION

BY MR. HARRIS:

Q Mr. Lecour, with respect to those 48 apartments which are

not renting at the market rent, if you were allowed to rent those at a market rent, would you obtain more or less than the current rental?

A Sure. Yeah, typically. It would vary on the margin between the rent they're paying and the current market. But, yeah, sure. There would be an increase.

Q There would be an increase?

A Yes.

Q What is the most — in all of this turnover for those 220 apartments, what is the most you could increase the rent from the controlled level to the market level? . . .

* * *

[63] Lecour - direct

. . . '89.

Q So when they were first decontrolled back in 1988 and 1989, they rented for more than they do today?

A Correct. That is just the dictates of the marketplace that was in force. Ebbs and flows.

Q How many of your apartments in the Carriage House are renting at market rents today?

A Including the ones that are in the escrow fund, about 250.

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Q 250 out of 298?

A Yeah.

Q Have you — since decontrol, vacancy decontrol, came into effect in the Borough of Fort Lee, have you made any efforts to force people out so you could obtain market rents?

A No.

Q Why have people moved?

A I guess the usual reasons. People buy houses. They transfer their jobs.

Q You have 17 people who moved within the building, of your new tenancies?

A That's correct.

Q The market on those you don't get to increase it to the market. You only get the raise of 15 percent. Is that correct?

A Right.

Q On those inter-buildings, you obviously didn't force those tenants out? . . .

* * *

[75] Krantz - direct

. . . lowered the rent?

A I've got one right now. Yes.

Q How much are you lowering the rent?

A I have a tenant in 9B who is currently paying $1225 for a two-bedroom, two-bath apartment and they are living in a non-rehabbed unit and feels they are not getting the value for the rent. And to keep this tenant and not exacerbate my vacancy factor on the anniversary date of this lease, which is December 1st, we are lowering the tenant's rent by $125 a month to keep him.

Q If I understand you correctly, you have half the building at half market rent and half the building at controlled rent?

A In or around that number. Yes.

Q Just about, roughly speaking?

A Yes.

Q Do the tenants who are paying the market rent — do they have the rehabbed apartments?

A Mostly.

Q And?

A None of the rent control tenants do.

Q Do the tenants who are paying the market rent — are they demanding more services, amenities or improvements to the building?

A Very much so, yes.

Q If you had vacancy decontrol across the board, are there [76] improvements that you would make to the building — that you would start making to the building today?

A Yes, sir.

Q Can you tell the Court what those might be?

A The building's heating system; it is 40 some-odd-years old. I would replace it. The building's roof is beyond its life value. I would replace it. The windows in the building are over 40 years old. I would replace them. The lobby decorations are original to the building except for the furniture and I would install, quote, unquote, a new lobby. The mail room. The same thing. Various exterior retaining walls would be changed. But these capital items with rent controlled tenants can't be contemplated.

Q How much would just those things that you mentioned cost you, if you did undertake them?

A In or around 600,000. It could be as high as 800,000.

Q Even assuming that you could pass through capital improvements that were required by state, federal or local law, would any of the ones that you mentioned qualify?

A No. The Fort Lee rent law once entertained a capital pass-through to tenants. But, again, with the same trap that they had on capital — the same trap that was in there regarding hardship is in this one, also. In that you must first receive a condemnation from various authorities pre-contemplating that replacement. . . .

* * *

A Well, no. No. They inquire after, perhaps, for a larger apartment. Somebody is getting married or having children. Usually transfers are for bigger apartments.

Q In your estimation, could the Carriage House have made the improvements to the building and to the apartments that it has, that Ms. Dabbs testified about, if there was no vacancy decontrol?

A It is my understanding that is the case, although I'm not directly involved with the financial aspect of those kinds of considerations within the company.

Q Do you know the ratio of your expenses to gross income?

A That I would not know.

MR. HARRIS: No further questions, your Honor.

CROSS-EXAMINATION

BY MR. SCANDARIATO:

Q Good afternoon. I'm a little confused. Maybe you can clarify something for me.

You indicated that 180 apartments turned over. That is on this chart between '93 and '96, and 220 apartments were in the fund. Did you say the other units were at market rent?

A Yes. Between 1988, when we first had decontrol, and

Appendix F

October of '93, when it was shut down and we began this escrow fund, in that period we had decontrolled approximately 220 apartments at an average rate of turnover of 50 a year, approximately. We have 220 apartments. Those were decontrolled when that . . .

* * *

[72] Krantz - direct

. . . steady — that is generally a fairly steady number. The controlled part is tough to recite to you because there is a wide variance. It could be — if you can help me with the permit? Are you talking pre '93 or post '88?

But due to the natural status of that would be that a one-bedroom apartment could have a disparity of three or four hundred dollars a month depending on what line it was in and how long that control tenant was in place.

Q Okay. Of the tenants that you have — the new tenants that you have rented to, how many of them are from Fort Lee?

A A vast, vast, vast minority.

Q Can you give us a percentage?

A A handful.

Q Handful?

A A handful. Five or six.

Appendix F

Q Typically, can you give the Court an idea of where the other tenants come from?

A New York, the periphery of New Jersey — the periphery of the metropolitan area. I've people coming across country. I have people from Africa. I have two tenants from Spain. I have tenants from Florida, the West Coast. You can't site any one pinpoint area. It is all over.

Q Have you ever made a hardship application?

A No.

Q Why not? . . .

* * *

[82] Laiken - direct

A Yes. I'm afraid to do that.

Q In what building do you own those condos?

A People brook. The building I built.

Q It is a building you built?

A Yes.

Q The Pembrooke?

A Yes.

Q And you converted it?

A Yes.

Q Where is the Pembrooke in relationship to the Crystal House?

A Next door.

Q So right next door is the owner of co-op units. You could increase the market rents on vacancy decontrol?

A Yes.

Q And at the Crystal House you cannot?

A Correct. I also built the Crystal House.

Q You built the Crystal House, too?

A Yes.

Q Do you know of any amounts that have been built to rent in Fort Lee since rent control came in?

A Not to my knowledge.

Q Have you ever made a hardship application?

A Yes.

Q When?

A For the Crystal House now? . . .

* * *

Appendix F

[91] Laiken - cross

Q So — those tenants have remained in place despite the fact you've only been making these cosmetic repairs?

A That's right.

Q Now, when you applied for your hardship in 1980, you knew, did you not, that that was a prerequisite of HUD in order for you to apply to them for preemption?

A I did.

Q So you didn't have any choice about going for the hardship because of HUD's requirement; isn't that right?

A If I went — if the Town granted me the hardship, I would not go for preemption.

Q But in order for you to go for preemption from HUD, you couldn't skip the Town, is that correct?

A That's correct.

Q Now, if you — if you were granted vacancy decontrol, would you have to make improvements in the previously rent controlled units in order to get a decontrolled rent for them?

A Depends if it is complete rent control — you can't invade an existing lease. If I understand the question, if we were granted complete rent control, we would make building-wide improvements that would benefit the existing tenants as well as new tenants as well as the market —

Q Let me try the market again. Assume you have a unit which is currently rent controlled?

A Right. . . .

* * *

[90] Laiken - cross

. . . be on a rational basis and I think, maybe, 20 or 30 percent.

Q What did you pay for the Crystal House?

A I didn't. I built it.

Q You built it. What is it worth today, if you know?

A Under rent control? Fort Lee was reassessed several years ago. The initial assessment was $12 million. I went for a hearing. When I informed them that it was a rent controlled building, to the surprise of the appraiser, it was reduced down to $3 million.

Q That is currently assessed at $3 million?

A Thereabouts.

Q But not $4 million?

A No.

MR. SCANDARIATO: Nothing further, your Honor.

Appendix F

CROSS-EXAMINATION

BY MR. TARELLA:

Q Mr. Laiken, you said you have 357 units at market rent, is that right?

A Correct.

Q And the total is 127 in the building?

A Plus a superintendant-manager, yes.

Q So since 1988 77 units have not turned over, is that right?

A 77 units?

Q 70 units. I'm sorry.

A Whatever it is. Yes. . . .

* * *

[206] Baar - cross

Q As buildings get older, don't they need more than maintenance?

A They need capital improvements and, first of all, for the overall building — you have the hardship mechanism. As you said, capital improvements are excluded and you have the annual general adjustment which has been higher than the inflation rate in recent years.

Appendix F

So there is not a command in the ordinance — there are overall rent increases which are higher than the inflation rate, annual adjustments.

Q Those annual increases on the low market rents don't help very much in terms of capital improvements, do they?

A They don't help as much as they would on market rents.

Q Isn't part of your formula of providing more affordable housing that as a result of rent control there would be a stock of lower quality housing that low income people can afford?

A I'd say the formula — by holding the rents down, you have affordable units.

Q Aren't those units of lower quality than the units that have vacancy decontrol?

A They might be.

Q That is the current condition in Fort Lee today, isn't it? Aren't there co-op and condo buildings a whole lot nicer than the old rental buildings that have been run down under rent control? . . .

* * *

[208] Baar - cross

I'm not saying I wasn't doing a study of whether there were no negative effects of rent control. Are you looking to see if there was a rational basis? I think you can say any policy has

positive and negative effects. One of the tradeoffs is, sure, if you keep the rents down, you might have less units being upgraded, or whatever.

But there is a tradeoff here. You have some benefits to the tenants. Is that more important than, let's say, raising the units to luxury or much higher level? There are competing policy considerations.

Q In any of these ordinances does the Borough of Fort Lee, the Council of the Borough of Fort Lee, say they're holding down the rents for 109 owners because they want to provide affordable housing to low and moderate income renters?

A My understanding is that the ordinance does not have a statement of purpose. The rational bases that I was looking at — rational bases for the policy independent of what is said in the ordinance which is common in ordinances where there is a rational basis but it is not stated in the law.

Q Is it your understanding that none of the ordinances passed by the Borough of Fort Lee regarding rent control have a statement of purpose or reasons?

A I'm not sure. I didn't think there was one in the ordinance. I didn't see one. It's possible there is one but I didn't see one. I was looking for an overall rational basis for . . .

* * *

[89] Laiken - cross

Q With regard to the Pembrooke, that is a condominium, you testified?

Appendix F

A Co-op.

Q Co-op. It is run by a cooperative board of trustees or whatever it is called?

A Yes.

Q You have none other than a member of the coop — as a result of your ownership, you have no control over that association?

A Yes.

Q The improvements were made and the building owners were a assessed?

A Yes.

Q Were you able to pass through those improvements to your tenants?

A No.

Q I'll ask you the same question that I asked Mr. Krantz. If vacancy decontrol were eliminated today, how much could you increase the rent on your units? Let's start with the market rent units.

A Not much.

Q Not much. What about the units that are not at market rent currently?

Appendix F

A I would — well, the control tenants — as Mr. Krantz pointed out, there is a variance on similar apartments because of the nature of rent control. Whatever increases would have to . . .

* * *

[71] Krantz - direct

. . . bedroom. Could you?

A I could charge it. I doubt if I would get it.

Q You couldn't rent it?

A That's right.

Q You have, I believe, 28 units in the fund, is that correct?

A Yes, sir.

Q How many total units do you have that are at market rent today?

A In or around half the building.

Q So around 72, 73?

A A little bit less. Sixty-eight — 68, 70, or so, yes.

Q The difference between the 68 or 70 and the 28; where did those come from and why aren't they in the fund?

Appendix F

A They are in the in the fund because the decontrol status was pre the fund. Pre-1993. On the renewal of those under rent control, the allowable increase, when plugged in, exceeded fair market conditions and, therefore, higher rents over the legal regulated rent were not charged.

Q What is the difference between the rent for a decontrolled apartment and a controlled apartment of the same type?

A Could you help me with that? Do that one more time.

Q A one-bedroom apartment that is controlled, What is the rent for that and the same type of apartment, one bedroom, that is decontrolled? What is the difference?

A I can answer the decontrolled part because that is a . . .

* * *

[57] Dabbs - direct

Q So the only thing the tenant pays to live there is his rent and his telephone?

A Yes.

Q You live in Fort Lee, don't you?

A Yes, I do.

Q What buildings do you consider the Carriage House's primary competition for tenants?

A Well, not building so much, because almost all of them are now co-ops and condos. So no specific building.

Q What type of unit would you consider the primary competition for the Carriage House?

A It would be more the condo — more the single condo and co-op owners more so than another building.

Q Why is that?

A Well, the different buildings have different amenities they can offer and the condo owners — they're pretty much free to negotiate whatever they could give and not give to the tenant.

Q If a condo association makes a capital improvement to the building, do they have the ability to pass that through to the unit owner?

A I know the Board of Directors does that in the condo and co-op apartment.

MR. HARRIS: No further questions for this witness, your Honor. . . .

* * *

[56] Dabbs - direct

Q What improvements — strike that.

When was the building constructed?

A In 1972.

Appendix F

Q How long has 440 Company owned the building?

A Since 1980.

Q Between 1980 and 1988, can you tell us what improvements were made?

A Well, we kept the building in repair, but we didn't make any major improvements such as putting in new appliances or air conditioners.

Q Why not?

A Well, because we were just — we're below market rent and there was no extra capital to put in those improvements for the new tenants or anyone else.

Q When you made these improvements between '88 and the present time, did you — strike that.

Can you tell us more about the Carriage House? What kind of a building is it and what are the amenities?

A Well, when a tenant comes to rent, they have a doorman building, okay. It is a high-rise doorman building.

All the apartments have balconies. We include the pool, the parking — the pool, the parking and all the electric, which is also including the air conditioning in the rental.

We're centrally located in the area which is near shopping, schools, and so forth, and transportation. . . .

* * *

Appendix F

[31] HASSAN-Direct

A No, I don't. No.

Q Do you know whether any borough agency keeps those records?

A I would say in the case of a condo, probably the assessor's office and the tax collector's office would probably have that record.

In the case of a co-op, they're shares, and I don't know if that's easily accessible.

Q But there's no systematic record keeping in this office of recording who owns which units?

A Only our files, and that's what the landlord files with us.

Q So it's based entirely on the landlord's voluntary compliance with the registration requirements when he rents out a unit?

A Yes.

Q Paragraph four of the stipulation refers to properties entitled to a one-time vacancy decontrol.

Do you see where I'm referring to? The last sentence of the paragraph.

A I'd like to read the whole paragraph.

Q Sure.

(Witness reviews.)

A Okay.

[32] Q Do you know what properties are referred to in that sentence —

A The last sentence.

Q — that were only entitled to the one-time vacancy decontrol?

A Yes, I do.

Q What properties are being referred to there?

A Any unit in a property that's other than co-op, condo or one-family home.

Q Okay. And was the distinction that's made in this paragraph based on Ordinance No. 90-32?

A I really don't remember.

I think so, yes. Yes.

Q Do you have a list of those properties?

A You know, I have a lot of lists around. This one list that I was looking at over here, I can remember typing that in 1973. See, all my smoke and everything has turned it yellow. There must be a list somewhere.

Appendix F

Q Well, when the borough passed the ordinance making a distinction between units that could have vacancy decontrol on more than one occasion and units that could only do it on a one-time basis, was there any determination made that your office [33] would, you know, then compile lists of which properties —

A No.

Q — fell into — okay.

The paragraph also refers to, ". . . a special marking made on those tenancy records to reflect same . . ." with respect to the units that are only allowed one-time vacancy decontrol.

A Yes.

Q What kind of special marking are they talking about?

A A notice comes in, we attach this letter tag (indicating).

Q It's a red tag?

A Yeah. If we run out of red, sometimes they're blue.

Q But, again, none of these records are computerized; is that correct?

A No, unfortunately.

Q Okay.

Are there any enforcement procedures to ensure that the

units that are only allowed one-time vacancy decontrol only get one-time vacancy decontrol?

A I would like to say that the landlords, the major landlords that I deal with, are very honorable . . .

* * *

[41] HASSAN-Direct

. . . number of multi-family rental units in the borough?

A No, I don't.

MS. BITTERMAN: I'd like to go on to Plaintiff's Exhibit 3, a letter dated April 6, 1994 to Liza Walsh from Brian Chewcaskie.

For purposes of identification, it's an April 6, 1994 letter from Brian Chewcaskie to Liza Walsh, attaching a seven-page list of, quote, "All Units That Would be Subject to the Rent Control Ordinance in Question," close quotes, which is ordinance No. 93-33A.

(Letter dated April 6, 1994 letter from Brian Chewcaskie to Liza Walsh with attached seven-page list is received and marked as Exhibit P-3 for Identification.)

BY MS. BITTERMAN:

Q Okay. The cover letter states that the attached list was prepared by Phyllis Hassan, Rent Leveling Administrator. Do you recognize this list?

A Yes, I do.

Q Okay. And did you compile this list?

A I did, yes.

Q How did you go about putting this list together?

A Based on filings by the landlord. . . .

* * *

[32] Saleh - direct

. . . pass it through. You have to make a hardship application?

THE WITNESS: It has to be part of a hardship application.

THE COURT: Okay.

Q Mrs. Saleh, when was the last hardship application filed with the Rent Leveling Board?

A A number of years ago. I don't remember exactly.

Q Well, does the year 1990 refresh your recollection at all?

A In my quick looking over my deposition, 1990 does ring a bell. But I'm not absolutely positive.

Q But that's what you testified to at your deposition?

A I had my records with me at the deposition.

Q I'll hand you your deposition just so you have reference to it.

(Deposition handed to Mrs. Saleh.)

Q Could you please turn to page 57.

After reading that page, can you confirm that 1990 was the last year a hardship application was filed?

A Yes. I can confirm that.

Q Yes?

A Yes.

Q At your deposition you had the records available. You answered that question after you had looked at your records at your deposition?

A Yes.

[33] Q Now, at your deposition you also testified about the number of condominium and co-op buildings.

Do you recall that?

A Yes. I recall discussing it. Yes.

Q How many buildings are either condos or co-ops?

A I don't recall.

Q If you could just take a minute and review your deposition, pages 16 to 25. If you can add up the buildings. We don't need all the names right now.

THE COURT: Did you do it already, Mr. Harris?

MR. HARRIS: Pardon?

THE COURT: Did you do the addition?

MR. HARRIS: No, I didn't do all the addition yet.

A You want me to add up all the —

Q Yes.

THE COURT: Can you do that?

A Without a calculator?

Q Without a calculator.

THE COURT: Why don't you help her, Mr. Harris?

You're not leading her. You'll take her through her deposition. Add them up.

Q Mrs. Saleh, is it true there are over 50 condo buildings in the Borough of Fort Lee?

A I'm sorry. I really don't have a number.

Appendix F

MR. HARRIS: Your Honor, perhaps I'll put that section . . .

* * *

[73] Krantz - direct

A Could never qualify. The law is fixed so that Riverview could never qualify under any condition to make an application and judge it and, hopefully, be successful.

Q Why is that?

A Because the current hardship law bases its criteria for rent adjustment based on the original investment to buy the building. In the case of Riverview, Riverview was purchased for $325,000 cash above its existing financing. Its existing financing at that time was assumed by the purchaser who was my grandfather. And based on a rate of return of ten percent, which was the rate that I believe the town recognizes as the criteria for hardship, as long as Riverview earns 32,000 or $35,000 a year in profit, it could never make a successful hardship application and expect success.

Q So you mean to tell me that in 1960, $325,000 in 1960 dollars?

A Right. Which would be equal to about two-million-eight or two-million-five today.

Q Is the basis upon which you have to apply for a hardship?

A Right. If the time evolution of money were applied to the 325 or $350,000 that was used to buy Riverview, assuming that

would be around two and a half to $3 million today, ten percent of that number I would possibly qualify and possibly would go ahead with our hardship application.

Q Have you ever applied for refinancing of your building? . . .

* * *

[83] Laiken - direct

Q For the Crystal House. Yes.

THE COURT: Could you talk into the microphone, please?

THE WITNESS: I'm sorry, sir.

A Approximately 1980.

Q And in 1980 what was the cost of making that application?

A Over $20,000 and expenses.

Q $20,000. What did you have to pay $20,000 for?

A The Town requires the applicant to pay for all expert witnesses, the Town's witnesses, the Town's accountants that come in to rebut any presentation that I make, the Town's tax experts and the applications. It cost us in excess of $20,000 which, of course, I had my own experts that I had to put on at the hearing.

Q So counting your experts and paying for the Town's experts, how much did it cost you?

Appendix F

A Over $20,000 in 1980.

Q In 1980. So you made this application and you $20,000. Did you have a hearing?

A Yes.

Q Before the Rent Leveling Board?

A Yes.

Q What happened to — what did they do with your application?

A They denied it.

Q Did you have any alternatives after that?

A Yes. . . .

* * *

[86] Laiken - direct

. . . building. So we will just do Band-Aid improvements.

Q What is the ratio of your gross income to expenses?

A At the latest tax year, in the mid-'70s.

Q The mid-'70s. Like 75 percent of gross income is your expenses?

Appendix F

A Yes.

Q What improvements would you make in the Crystal House if you had vacancy decontrol across the board?

A Immediately, we would replace all the windows; replace the roof, which is in very sad condition. We'd replace a good part of the heating system which is the original since I built the building. We'd have new paving, new parking, new lobby and public area improvements, et cetera, et cetera. Approximating well over a half million dollars.

Q When did you construct the building?

A Approximately 1970.

Q When did you build the Pembrooke?

A About four years after that.

Q Can you describe — today is the Pembrooke nicer than the Crystal House?

A A different world.

Q A different world?

A Yes. The Pembrooke is up to date. Improvements have been made. You just walk into the lobby of the Pembrooke. It is completely different than the building at the Crystal House. . . .

* * *

Supreme Court, U.S.
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No. 97-1035

In The

Supreme Court of the United States

October Term, 1997

440 COMPANY,

Petitioner,

vs.

BOROUGH OF FORT LEE, a municipal corporation, and the MAYOR and COUNCIL of the BOROUGH OF FORT LEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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The Respondent, Borough of Fort Lee, a municipal corporation, and the Mayor and Council of the Borough of Fort Lee ("Fort Lee") respectfully request that the Court deny the Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Third Circuit filed September 16, 1997 affirming the decision of the United States District Court for the District of New Jersey filed December 14, 1996, reproduced in the Appendix to the Petition for a Writ of Certiorari ("App.") at App. 1a and App. 3a respectively.

STATEMENT OF THE CASE

Fort Lee respectfully opposes the Petition for a Writ of Certiorari, which is, at best, confusing. The petition selectively utilizes "uncontroverted facts" or "evidence" not supported in the record and cites decisions not made or requested.

A. Course of Proceedings and Disposition of the Case Below.

The Borough of Fort Lee ("Fort Lee") enacted its first rent control ordinance in 1972. As the character of Fort Lee has changed over the years, the governing body has revised and amended the rent leveling ordinance to reflect those changes.

The original rent control ordinance was amended from time to time. The ordinance was again amended by Ordinance No. 88-25, App. 54a-58a, adopted June 9, 1989, to provide for vacancy decontrol.[1] The ordinance was further amended by Ordinance No. 90-32, App. 62a-67a, adopted September 27, 1990, to limit certain rental units to one vacancy decontrol increase after the effective date of the amendment.

---

1. Vacancy decontrol permits a landlord to rent a vacant unit at the then current market price.

Following adoption of Ordinance No. 90-32 in 1990, Fort Lee Property Owners Association, an association in which petitioner 440 Company was a member, instituted an action in the Superior Court of New Jersey, Law Division, by way of Order to Show Cause, challenging Ordinance No. 90-32. The challenge focused on Section I(f) of the ordinance (App. 64a) which provided:

> The provisions of this section shall be applicable to single family homes, condominium and cooperative rental units. However, once a vacancy in such a unit occurs as defined in subsection "c" hereof, the provisions of this section shall not be applicable. It is the express intention hereof that single family homes, condominium and cooperative rental units shall be provided permanent vacancy decontrol.

Pursuant to other relevant sections of the ordinance, all other rental units were provided with partial vacancy decontrol or one time vacancy decontrol. Ordinance No. 90-32, Section I(c)(1). App. 63a.

In the Superior Court action, Fort Lee Property Owner Association claimed that providing single family homes, condominium and cooperative units with permanent vacancy decontrol, while limiting all other rental units to partial or one time vacancy decontrol, was improper and unconstitutional.

By Letter Opinion issued February 5, 1992, the Honorable Edward J. Van Tassel, J.S.C. determined that Ordinance No. 90-32, and specifically the challenged classification, be constitutional as applied.

Fort Lee Property Owners appealed and the Superior Court of New Jersey Appellate Division affirmed substantially for the reasons set forth in Judge Van Tassel's opinion.

The most recent amendment to Fort Lee's rent control ordinance was Ordinance No. 93-33A (App. 68a-70a), adopted September 14, 1993. This ordinance amended Ordinance No. 90-32 and, basically, limited vacancy decontrol to small scale landlords, *i.e.*, single-family, condominium and cooperative rental units. Vacancy decontrol was eliminated for all other rental units, such as apartments.

Petitioner, 440 Company ("440"), wanting another bite of the apple, then commenced this action on September 18, 1993 in the United States District Court for the District of New Jersey. 440 specifically challenged Ordinance No. 93-33A but tried to argue that rent control should be abolished in Fort Lee. The District Court conducted a bench trial on October 9th and 15th, 1996. Although 440 asserts that there was uncontroverted testimony presented to support its position, the District Court focused on the expert testimony presented by 440 and Fort Lee. 440 presented Susan M. Wachter ("Wachter") to testify on its behalf. Wachter basically testified as to the conclusions reached in her report which was introduced into evidence as plaintiff's trial exhibit 1002.

Wachter's report and testimony contained the following conclusions:

1. There is no shortage of housing to be resolved by the regulation of residential rents in Fort Lee.

2. Both before and after consideration of the effects of vacancy decontrol, rent control produces no noticeable positive effect on the overall housing market in Fort Lee.

3. The rent regulation has major disparate economic impacts on only a small segment of the market.

4. Rent regulation imposes major negative effects on the Fort Lee housing market through reductions in the quantity and quality of rental housing opportunities. This, in turn, reduces the aggregate real property tax base of Fort Lee and shifts the burden of real property taxes to owners of single family homes, condominium and cooperative units.

It is important for this Court to recognize that Wachter's analysis was limited to the economic impacts of rent control on the housing market in Fort Lee. In simple terms, Wachter did not investigate any other basis for rent control but instead relied on an economic impact analysis.

440 asserted that Wachter conducted an extensive two year study of the Fort Lee housing market. No evidence of any study was produced in her report or her testimony. However, to arrive at her conclusion that there wasn't a housing shortage, Wachter relied solely on information contained in the 1990 census report. In addition, in conducting her analysis, Wachter did no site inspections, never visited the Borough of Fort Lee, did not speak to the Fort Lee Tax Assessor, Rent Leveling Administrator, landlords other than the plaintiffs or tenant leaders. Wachter did no analysis of tax records to support her claim of a shift of tax burdens. Petitioner did not supply this court with these portions of Wachter's testimony.

Fort Lee presented evidence that didn't rely solely on an economic analysis of the impact of rent control. Instead its evidence addressed whether or not there is a rational basis for rent control in Fort Lee, the appropriate standard for the court to consider. The issue presented to the District Court was not what the wisest public policy might be but rather whether the ordinance has a rational basis. The criticisms of rent control as a policy contained in the Wachter report and testimony were not dispositive of whether or not a rational basis exists and

further, any rational basis for rent control, whether articulated in the ordinance or not, is sufficient to find the ordinance to be constitutional. To support the rational basis, Fort Lee presented the testimony of Kenneth K. Baar ("Baar"). Baar's report was introduced into evidence as defendant's exhibit D-3. Baar testified that the preservation of affordable housing stock in Fort Lee as well as the large rent increases resulting from decontrol provide a more than sufficient rational basis and justification for the continuation of rent control. Baar's analysis was based upon a review of population income levels versus rents and review of records of rent levels and rent increases maintained by the Fort Lee Rent Leveling Board.

Barr also explained the rational basis for the distinction created between single family, condominium and cooperative units on the one hand and multi-unit apartment buildings on the other hand with respect to the issue of vacancy decontrol under Ordinance No. 93-33A. The following factors justify this distinction and provide a rational basis for the ordinance:

1. There is a difference between the mode of operation of professional landlords owners of large multi-family buildings and small landlords who own only one cooperative, condominium or single family home or even landlords who own only a few units.

2. There is a difference in the treatment and pass-through of operating costs as they apply to condominium and cooperative owners as compared to multi-family apartment house owners.

3. There are at least two housing policy considerations which justify the distinction, those being:

A. The desire to maintain an affordable rental housing stock, and

B. Preventing the removal of condominium, cooperative and single family housing units from the rental market by excessive regulation.

4. Large multi-family apartment houses present a greater potential for harassment of existing tenants, in order to secure vacancies and decontrolled rents than do condominiums, cooperatives and single family homes.

The District Court reviewed the expert testimony and concluded by Letter Opinion that the Petitioner "failed to demonstrate by clear and convincing evidence that the ordinance is not supported by a rational basis" App. 16a. A final Order was entered by the District Court declaring Fort Lee Ordinance No. 93-33A constitutional. App. 3a-4a. The District Court obviously did not give great weight to the testimony of the other witnesses presented by 440 as that testimony did not address the rational basis for the rent control ordinance.

This judgment was affirmed by the United States Court of Appeals for the Third Circuit for the reasons set forth in the District Court's opinion. App. 1a-2a.

Fort Lee's position has been, and continues to be, that its rent control ordinance (with the present vacancy decontrol provision, Ordinance No. 93-33A) is a valid, constitutional exercise of its police power and that providing vacancy decontrol to certain types of, but not all, rental units, is a valid constitutional classification.

B. Corrections of Misstatements in the Petition.

The opinion of the United States District Court for the District of New Jersey correctly sets forth the facts of this case. In the interest of keeping the Brief brief, Fort Lee respectfully

directs the Court's attention to the District Court's opinion. The findings and conclusions contained in the District Court's opinion, accurately reflect the facts and issues in this case.

Pursuant to United States Supreme Court Rule 15.2, Fort Lee brings the following misstatements of fact in the petition to the court's attention.

440, throughout the petition, as it had throughout the prior proceedings, asserts what can be characterized as the 5% solution. 440 continually asserts that if a vacancy rate in excess of 5% exists, there can be no rational basis for a rent control ordinance. This simplistic approach ignores the fact that other bases for rent control exist irrespective of a vacancy rate that may exceed 5%.

440 also selectively refers to Fort Lee's rent control ordinances and amendments in its petition. 440 ignores the prior litigation involving Ordinance No. 90-32, (App. 62a-67a) which was upheld by the Superior Court of New Jersey, Appellate Division, *but* continually refers to Ordinance 95-25A (App. 71a-90a), an ordinance never legally adopted by Fort Lee, to bolster its argument. This invalidated ordinance is not evidence that should be considered by any court and is presented to cloud the real issues in this case.

The most glaring misstatement in the petition is the selective inclusion of testimony to establish an "uncontroverted" expert opinion. The findings of the District Court and the testimony of the witnesses contained within this Brief indicate that 440's expert opinion was far from uncontroverted. It was insufficient to meet 440's burden of proof.

A fact is not a fact merely because petitioner's attorney states so in the petition.

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE IT DOES NOT SATISFY THE CRITERIA GOVERNING REVIEW ON CERTIORARI.

440 does not identify the special and important reasons under Supreme Court Rule 10 for granting its Petition for a Writ of Certiorari. It is apparent that 440 seeks review of a decision of limited precedential value solely because it believes the United States District Court of the District of New Jersey reached the wrong conclusion in applying the governing legal principles from *Pennell v. City of San Jose*, 485 U.S. 1 (1988) to the facts of this case.

440 asserts that the District Court's decision is in conflict with *Pennell*. The decision is not in conflict. *Pennell* held that other bases exist to support the rationality and legitimate government objective to support a rent control ordinance. Further, there is no conflict between *Pennell* and other circuits. The decision in *Pennell* is reflective of a differing fact pattern and certainly does not constitute a "conflict" that necessitates resolution by this court.

Since the District Court correctly applied the holding of *Pennell*, 440's petition is necessarily limited to the claim that the District Court misapplied the legal standard to the particular facts of this case.

> "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court*

> *Practice*, § 4.17 at 193 (7th ed. 1993) (footnote omitted).

This admonition is particularly apt in this case given the limited precedential effect of the decision below.

II.

ORDINANCE NO. 93-33A HAS A RATIONAL BASIS AND SERVES A LEGITIMATE PUBLIC PURPOSE.

The thrust of 440's petition is that the District Court's and Third Circuit's decision is in conflict with this Court's decision in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). The District Court applied the holding of this Court in *Pennell* to the facts of this case.

This court has consistently affirmed that states have broad power to regulate housing conditions in general, and the landlord tenant relationship in particular, without paying compensation for all economic injuries that such regulation entails. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982).

This Court in *Pennell* recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare and that the primary purpose of rent control is the protection of tenants. *Id.* at 13.

Further, this Court addressed the issue of rational basis for rent control. 485 U.S. 1 (1988), concluding that legitimate and rational goals of rent control regulations included: "reducing the burden of housing costs on low income tenants" (485 U.S. 12) "the protection of consumer welfare" (485 U.S. 13), and "reducing the costs of dislocation that might otherwise result if

landlords were to charge rents to tenants that they could not afford" [a purpose not stated in the ordinance]. (485 U.S. 14, n.8).

The rational basis or purpose need not be stated in a rent control ordinance in order that ordinance to be valid. *Pennell, supra.*

The District Court relied on this Court's decision in *Pennell* and numerous New Jersey state court decisions to conclude that Fort Lee's ordinance served a legitimate rational basis.

In *Hutton Park Gardens v. West Orange Township Council*, 68 N.J. 543, 564 (1975), the New Jersey Supreme Court noted that serious housing shortage conditions have usually provided the rational basis for rent regulations. However, the Court went on to note that "one might conceive of other circumstances which might rationally persuade a legislative body that the free housing market was not functioning in the public interest." *Id.*

Moreover, as indicated by Baar, there are a host of other legitimate reasons to justify the imposition of rent control, such as addressing the inequities in the bargaining powerbetween large apartment complex landlords and their tenants, and preserving the availability of affordable rental housing in the Borough. 440's argument has been soundly rejected by the New Jersey Supreme Court and is simply an attempt to shift the burden of proof to justify the ordinance to a municipality. In fact, it was 440's burden, by clear and convincing evidence, to rebut the presumption of validity that the ordinance enjoys. 440's proffer was patently inadequate.

440 relied on the expert report prepared by Wachter and her testimony which postulates four bases alleging the absence of a rational basis to justify the continuance of rent control.

These contentions are critiques of rent control, but they fail to prove the lack of a rational basis to justify rent control. Wachter admitted that she never visited Fort Lee or did any research into the Fort Lee housing market by speaking to the Tax Assessor, Rent Administrator, *etc.* In fact, these critiques are insufficient even to compel Fort Lee to come forward with justification for the ordinance.

In attempting to meet the burden of proof required to attack the rent control ordinance, 440 relied on the Wachter report claiming that a vacancy rate of 9.5% demonstrates lack of a housing shortage[2]. 440 proffers these statistics in an effort to show that the challenged rent control ordinance has no raison d'etre and is therefore not rationally related to the legitimate end of alleviating a housing shortage. However, courts have declined to give such allegations much weight in determining whether a municipality's rent control ordinance is arbitrary and rationally unrelated to a legitimate end. *Troy Hills Village v. Parsippany-Troy Hills,* 68 N.J. 604 (1975). *See also Helmsley v. Fort Lee*, 362 F. Supp. 581, 594 (D. N.J. 1973), noting that isolated evidence of vacancy rates in a particular apartment complex is of limited value in demonstrating the absence of a housing shortage.

The court in *Troy Hills*, *supra* at 617 found that vacancy rates are at best an "oblique indication of the state of the housing market", and concluded that "a high vacancy rate in a particular complex may indicate . . . poor management, substandard construction, undesirable locations, or grossly excessive rent levels." *Troy Hills*, *supra* at 604 noting *Parkview Village Associates v. Collingswood*, 62 N.J. 21 (1972). In *Troy Hills*, the plaintiff submitted a survey of the average turnover rates of apartment complexes in Parsippany-Troy Hills showing that

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2. Baar calculated the vacancy rate at 6.8% utilizing the same census data and excluding owner occupied units.

39% of the rental units had a yearly turnover. In addition, a rental agent of an apartment complex containing 1,108 units testified that despite advertising efforts, there were an average of 20 vacancies per year. *Troy Hills*, 68 *supra* at 616 (1975).

In general, proof of the absence of a housing shortage requires careful analysis of the housing needs and income levels of the various categories of persons who actively desire to live in the community and evaluation of the availability of rental units within the municipality suitable to the needs and financial capacity of those potential tenants. *Albigese v. Jersey City*, 127 N.J. Super. 101, 110-11 (Law Div. 1974), *modified on other grounds*, 129 N.J. Super. 567 (App. Div. 1974). *Troy Hills*, *supra*, at 617.

Wachter, 440's expert, employs a simplistic analysis of vacancy rates without any reference to the specifics of the Fort Lee rental market, housing needs and income categories which patently fails to address this standard. Further, no evidence has been provided on the needs and income levels of persons desiring to rent units within Fort Lee. No evidence produced considered the relationship between the rent levels of vacant units and the rent paying ability of prospective tenants.

Wachter next posits that the number of regulated rental units is too small to have a positive impact on the Fort Lee housing market. In fact, this rationale provides a compelling basis for continuing rent control. As detailed in Baar's report, Fort Lee suffers from a severe lack of affordable housing, and the problem seems more severe in Fort Lee than in Bergen County as a whole. Preserving affordable housing by reducing the burden of housing costs on low income tenants is a legitimate and rational goal of rent control. *Pennell* at 12. Protecting the small number of rent controlled units remaining in Fort Lee and preserving the availability of this housing for all Fort Lee residents, is ample justification for rent control.

Wachter further claimed that classifications contained in Ordinance No. 93-33A have a major disparate economic impact on small segment of the market. Presumably, 440 advances this observation in support of its contention that Ordinance No. 93-33A violates the Equal Protection Clause because there is no rational basis for distinguishing among condominium, cooperative and single family dwellings from multi-family apartment units. However, this argument has already been rejected by the New Jersey Courts in *Fort Lee Property Owners Association v. Borough of Fort Lee.*

As a general proposition, the Equal Protection Clause of the Fourteenth Amendment does not forbid classifications. It simply keeps governmental decision makers from treating differently persons who are in all respects alike. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The New Jersey Supreme Court has determined in *AMN, Inc. of New Jersey v. Township of South Brunswick*, 93 N.J. 518 (1983) that a multi-dwelling unit landlord is not in "all respects [a]like" the owner of a single family, condo or coop dwelling unit. *AMN*, *supra* at 526.

The court in *AMN* noted that there were other legitimate reasons for classifying owners of housing units of two or less as being exempt from certain forms of rent control. Essentially, professional landlords of multi-dwelling units or large apartment complexes, as opposed to single-family unit renters including condos and coops, are perceived as "being less caring or responsive to tenants' demands and have[ing] an unequal bargaining power . . . " *Id. See Albigese v. Jersey City*, 127 N.J. Super 101, 111 (Law Div. 1974) holding that the purpose of rent control is to prevent oppressive rental increases, especially in light of the fact that tenants have been deprived of the freedom of contract by the absence of a competitive housing market.

In addition to this, the *AMN* court recognized that many municipalities are reluctant to subject landlords of single-family rental units to the burden of complying with the complicated and burdensome provisions existing in most rent control ordinances. *Id.* This is particularly true regarding vacancy decontrol upon tenant turnovers, which can avoid the need for small unit owners to file hardship applications, which Wachter categorizes as expensive and burdensome. Other reasons supporting classification differences between professional landlords and the single-family, condo, or co-op owner have been, as stated by Baar, the

> interplay between competing housing policy considerations regarding diminution of the overall rental housing stock by maintaining the affordable rental housing and the removability of different types of rental units from rental status.

In reviewing 440 Company's petition challenging the constitutionality of Ordinance No. 93-33A, this Court must apply the holding of *Nordlinger*, *supra*, as expressed in *Albigese*, *supra* which held:

> [A]lthough the legislation could have been made applicable to all rentals, and although other suggestions might be made for a difference point of demarcation, the Court has no right to interfere with the legislative discretion so long as the result comports with rationality.

Albigese, at 116. States are accorded wide latitude in the regulation of their local economies under the police powers, and rational distinctions may be made with less than mathematical exactitude. Neither the size of the affected segment of the population nor the extent of the impact are determinative.

Gateway Apts. v. Mayor & Tp. Council of Nutley Tp., 605 F. Supp. 1161, 1166 (D. N.J. 1985). In fact, the Borough submits ample justification for the classifications of Ordinance No. 93-33A. The Baar report summarizes these bases:

1. Differences in the mode of operation of professional landlords and landlords who own only a few units.

2. Differences in the treatment of the operating costs of apartment owners and condominium owners.

3. The interplay between competing housing policy considerations regarding diminution of the overall rental housing stock, maintaining the "affordable" rental housing stock, and the "removability" of different types of rental units from rental status.

4. Differences in the potential for harassment among apartments and condominiums.

Although Fort Lee submits a rational basis supporting the classifications contained in its ordinance, it is not constitutionally required to articulate any reason. The Court in *Nordlinger* noted that

> the Equal Protection Clause does not demand, for purposes of rational-basis review, that legislature or governing decision makers actually articulate at any time the purpose or rationale supporting its classifications.

Nordlinger, U.S. at 15 *quoting United Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). The presence of these bases, coupled with the ordinance' presumption of validity, rebut any inference raised by the plaintiff that the classifications fail to pass constitutional muster.

Fort Lee, through its expert, Baar, offered substantial reasons for the continuation of rent control, including the preservation of affordable housing stock and protection of tenants from steep rent increases and displacement. The classifications contained in Ordinance No. 93-33A are amply justified, as articulated in the Baar report and detailed herein. While 440's proofs are patently insufficient and have already been rejected by other courts, the Fort Lee rationales, coupled with the presumption of validity that municipal enactments enjoy, dictate that the Fort Lee rent control scheme passes constitutional muster in all respects.

III.

DR. BAAR'S TESTIMONY WAS CREDIBLE AND CORRECTLY RELIED UPON BY THE DISTRICT COURT.

440 asserts that the District Court's acceptance of Baar's testimony was acceptance of "unsubstantiated speculation". Petition at 18. However, the same can be said as to the opinion of 440's expert, Susan Wachter. There is no conflict with any of this court's decisions regarding the District Court's acceptance of Baar's testimony. An expert is permitted wide latitude to offer opinions including those that are not based on first hand knowledge or observation. *Daubert v. Merrell Dow Pharmaceutical Inc.*, 509 U.S. 579, 592 (1993).

Quite simply the District Court disagreed with 440's analysis of the expert testimony.

The District Court focused on the opinions of the two experts in the case stating:

> In the case *sub judice*, plaintiff's expert, Dr. Susan Wachter, testified that there was no housing

shortage in Fort Lee, rents are stable, and rent regulation has no impact on the market. Dr. Wachter based these conclusions on data from the most recent national census of 1990, an analysis of Fort lee and its Rent Leveling Board as well as a study of the escrow fund. Dr. Wachter concluded that the vacancy rate of apartments in Fort Lee is 9.55%. After a study of the escrow fund, Dr. Wachter concluded that less than 1% of the housing in Fort Lee is impacted by rent control. Therefore, the doctor concluded, the rent control ordinance does not have an impact on housing in Fort Lee. Finally, Dr. Wachter noted that rent control does not necessarily provide affordable housing because it requires a comparison of rent to income. In fact, the doctor opined, rent control has decreased the value of buildings and discouraged the new construction of apartment buildings in Fort lee.

In contrast, defendant's expert, Dr. Kenneth K. Baar, asserted the three reasons previously annunciated by the United States Supreme Court for rent control, including the prevention of excessive rent increases and the maintenance of affordable housing. The doctor admitted that the rent controlled units are of a lower quality than the units which are permitted to rent at market value. Furthermore, Dr. Baar calculated the vacancy rate in Fort Lee to be 6.8%. While Dr. Baar conceded that the standard vacancy rate which indicated a housing shortage was 5% or less, he posited that this high vacancy rate could be due to landlord profit maximization strategies, *i.e.* allowing a unit to remain vacant for a longer period of time to obtain a higher rent. Therefore, Dr. Baar opined, there could still

exist a shortage of affordable housing. However, Dr. Baar also studied the 1990 census in arriving at his conclusion, and such data did not include an analysis of the income level of renters.

In his report, Dr. Baar asserted three reasons why the distinction between apartments and small rental units is rational. First, Dr. Baar stated that there were differences in the mode of operation of landlords of large apartment complexes and small scale renters. For example, large landlords are "less caring or responsible to tenants' demands" and "tend to be rent maximizers". (Report of Dr. Kenneth K. Baar, Sept. 1996). Second, condominium owners are not permitted to pass through increases in property taxes to tenants by increasing rents. Third, Dr. Baar asserted that Fort Lee eliminated vacancy decontrol because it was afraid that the continued conversion of apartments to condominiums or cooperatives would create a shortage of affordable rental housing. Finally, Dr. Baar posited that vacancy decontrol leads to landlord harassment of tenants to vacate units and increase rent. On cross-examination, Dr. Baar revealed that this harassment theory was the conclusion of a 1972 study performed in New York City. Dr. Baar also relied on the Comprehensive Housing Affordability Strategy ("CHAS") Report, which found that there was not enough affordable housing in Fort Lee based on the "feelings of observers."

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Obviously the District Court reviewed the expert reports in evidence and weighed the testimony of both Wachter and Baar

to make its factual findings. The court correctly concluded that Baar's testimony addressed the correct legal standard, which Wachter's did not, and that it properly supported the constitutionality of the ordinance.

The District Court then concluded that 440 did not meet its burden of establishing that Ordinance No. 93-33A lacked a rational basis by clear and convincing evidence.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

440 COMPANY,

Petitioner,

vs.

BOROUGH OF FORT LEE, a municipal corporation, and the MAYOR and COUNCIL of the BOROUGH OF FORT LEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Neither the Third Circuit nor the Respondents in their opposition brief addressed the central issue presented by this case, namely, the absence of any findings that, as applied to the facts of the current Fort Lee housing market, Ordinance No. 93-33A (the "Ordinance") is rationally related to a legitimate government purpose. Not content with the liberal rational relationship standard accorded municipalities with respect to economic regulations, Respondents ask this Court to disregard the requirements it established in *Pennell v. San Jose*, 485 U.S. 1 (1988), and uphold a regulation that is demonstrably irrational. Rather than address the facts raised in Petitioner's brief, the Respondents merely repeat the standard for determining when a price fixing regulation is constitutional and state in a conclusory manner that they have satisfied that standard. Pursuant to Respondents' rationale, a governing body is free to impose restrictions on the operation of the free market whenever it deems a redistribution of income to be politically expedient.

Respondents fail to cite a single fact specific to the Fort Lee housing market to support its conclusions that the Ordinance has a legitimate purpose and is rationally related to meeting that purpose. The gist of Respondents' argument is that as long as a municipality simply brings an expert into court reciting a magic formula comprised of abstractions, such as rent control "preserves affordable housing stock" and "vacancy decontrol results in large rent increases," a court need not bother to take note of the reality of an existing market that contradicts these platitudes. It is just this kind of hollow reasoning that *Pennell v. San Jose*, 485 U.S. 1 (1988) rejected. The core of the rational relationship test enunciated in *Pennell* is that a governing body cannot justify rent control by crying monopoly or rent gouging in a market where a monopoly does not exist and a high vacancy rate makes the market inherently competitive. By affirming a rent control regulation in a case where

the uncontradicted evidence clearly established the absence of such conditions, the Third Circuit is in conflict with the interpretation of the *Pennell* test enunciated in other circuits. Specifically, in contrast to the instant case where there was no proof that market conditions warranted government interference, in every post-*Pennell* case decided in other circuits, price regulations were upheld because they were enacted to deal with an existing problem that could not be corrected by an unregulated market. *See Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1992); *Richardson v. City of Honolulu*, 124 F.3d 1150 (9th Cir. 1995).

Notably, Respondents appear to be addressing a different adversary altogether. For example, almost a quarter of the opposition brief is a response to an equal protection challenge that was never raised in Petitioner's brief.[1] Paradoxically, Respondents never address or refute the specific facts adduced at trial, such as the absence of a housing shortage or rent gouging in Fort Lee, that support Petitioner's claim that as applied to the market at issue, the Ordinance is arbitrary and counter-productive. Nor do the Respondents explain what bearing the abstract generalities propounded by their expert, such as the need for rent control to address inequities in bargaining power between landlords and tenants, have in a market where the landlords have demonstrated that they have no such power. Appendix F of Petition for a Writ of Certiorari at 130a, 142a.

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1. For the record, Petitioner has no quarrel with the position that a classification that distinguishes between large scale and small scale property owners may be valid. However, nothing in the evidence presented at trial demonstrated that the Ordinance at issue realized such a distinction. On the contrary, the evidence was clear that a number of small scale property owners were affected by the Ordinance. In fact, the vast majority of the buildings impacted by the Ordinance contain six or less units. Appendix E of Petition for a Writ of Certiorari at 118a, 119a.

REPLY TO THE RESPONDENTS' STATEMENT OF FACTS

Respondents' challenge to the testimony and report of Dr. Susan Wachter, Petitioner's expert, fails to survive scrutiny. On page 4 of their Opposition Brief, Respondents state that Dr. Wachter relied solely on information contained in a 1990 census report as the basis for her study. This criticism is belied by both the trial testimony of Dr. Wachter and the report itself. As was established at trial, Dr. Wachter's research included detailed analysis of facts about the operation of the Fort Lee housing market for a three year period that were provided by the escrow fund mechanism administered by the United States District Court of the District of New Jersey (the "District Court") since 1993. Dr. Wachter's also testified that information provided by an affidavit submitted by the deputy tax assessor of the Borough of Fort Lee and the sworn deposition testimony of the Borough's rent leveling administrator were taken into account when she prepared her analysis.[2] Appendix E of Petition for a Writ of Certiorari at 110a, 113a, 117a.

Respondents criticize Dr. Wachter's analysis on the ground that it was limited to the "economic impact" of rent control without citing what other "facts" would be relevant to a determination of whether an economic regulation is justified or not. Respondents' Brief in Opposition at 4. This criticism is especially puzzling in light of the failure of Respondents' expert, Dr. Kenneth Baar, to produce any factual evidence, economic or otherwise, concerning the current Fort Lee market. Instead, Dr. Baar presented a series of hypothetical bases for rent control, such as "the preservation of affordable housing stock." Petitioners do not challenge that these

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2. Consequently, the substance of Respondents' criticism on page 11 of their Brief that Dr. Wachter did not "speak" to the tax assessor or rent administrator is unclear; presumably, the Respondents are not suggesting that such conversations would have contradicted the sworn testimony of representatives of these bodies.

abstractions can be a basis for a municipality's right to enact rent control; rather, the heart of Petitioner's argument is that there is no evidence that as applied to the Fort Lee housing market the Ordinance at issue has anything to do with realizing these principles.

Respondents also state that the analysis of Dr. Baar was "based upon a review of population income levels versus rents" without citing any evidence that such a review was undertaken with respect to Fort Lee. Respondents' Brief at 5. Not surprisingly, Respondents do not detail what the actual results were of this "review." In fact, Dr. Baar's determination that Fort Lee had a "shortage of affordable housing" was not based on any studies relating the income level of Fort Lee residents to prices in the housing market; absent such a comparison, there was no way to determine that such a shortage existed. Respondents' statement on page 5 of their Brief that Dr. Baar "reviewed records maintained by the Fort Lee Rent Leveling Board" is also misleading. In fact, Dr. Baar testified that he only looked at files for the buildings that he had been told were "most likely to have the most substantial rent increases."

REPLY TO RESPONDENTS' ARGUMENT

A. Unfounded Speculation Is Not A Sufficient Basis For The Imposition Of Rent Control.

Nowhere in their papers do Respondents contest Petitioner's assertion that the only basis in the record for the decision to uphold the Ordinance was testimony by Dr. Baar, that rent control *could*: (1) protect tenants from landlord harassment; (2) maintain affordable housing; and (3) prevent excessive rent increases. To the contrary, the Respondents cite the portion of the opinion that establishes that this testimony was the foundation of the District Court's decision to uphold the Ordinance. Respondents' Brief at 17-18. Respondents also fail to dispute Petitioner's argument that the mere recitation of these

platitudes in the absence of any evidence that such conditions either existed in Fort Lee or that the Ordinance alleviated such conditions was not a sufficient basis to find the Ordinance constitutional.

Respondents try to sidestep their inability to fill in this "missing link" by insisting that Petitioner failed in its proofs. To do this, Respondents misstate and simplify Petitioner's evidence by reducing it to a single equation that a vacancy rate above 5% indicated the absence of a housing shortage. Respondents' Brief at 11. While this proposition is true, as Dr. Baar conceded, Respondents do not neither address nor refute the following additional facts, which were established at trial:

- rents have been stable in Fort Lee since 1993;
- the Fort Lee housing market is competitive;
- there is no evidence that the Fort Lee housing market is a monopoly or oligopoly, or threatens to become either;
- the Ordinance impacts on less than one percent of the housing market;
- the data provided by the operation of the escrow fund demonstrated that negotiated rents frequently provided for less than the increase allowed under the rent control ordinance.

Appendices D, E and F of Petition for a Writ of Certiorari at 91a, 94a, 95a, 111a, 112a, 118a, 123a, 125a, 130a.

Ignoring the fact that none of the indicia usually cited as a predicate to rent control exist in Fort Lee, Respondents proceed by baldly stating that "there are a host of other legitimate reasons

to justify the imposition of rent control," without citing a single fact to establish that any of these other "legitimate reasons" has anything to do with the promulgation and application of the Ordinance. Respondents' Brief at 10. To the contrary, Respondents cite "addressing the inequities in the bargaining power between large apartment complex landlord and their tenants" as one such reason for rent control. *Id.* However, not only was the record completely devoid of any data confirming that such an inequity was present in Fort Lee, but the testimony established that because of market changes, especially the enormous number of conversions of rental buildings to condominiums and cooperatives, bargaining power was now in the hands of tenants. Similarly, Respondents cited the maintenance of affordable housing as a rationale for rent control. Respondents' Brief at 12. However, Respondents conceded that no studies comparing rent to occupant income were ever undertaken and, absent such a comparison, there is no way to determine whether or not there is a shortage of affordable housing.

Essentially, Respondents appear to argue that even when confronted with facts establishing the lack of a rational relationship between a price regulation and the market, a governing body has no obligation to produce a single shred of proof to the contrary. According to the Respondents' interpretation of the burdens of proof with respect to challenges to economic regulation, a defendant governing body becomes a perpetual moving target. Whenever a plaintiff presents facts showing that the usual justifications for government interference with the market are not present, all the municipality need do is come up with a speculative rationale untied to any actual scenario. Petitioner contends that this is not what the Court intended when *Pennell v. San Jose* was decided.

B. Dr. Baar's Speculative Testimony Had No Basis In The Facts Of The Present Fort Lee Housing Market.

Interestingly, Respondents do not dispute Petitioner's assertion that the sole basis for the District Court's decision to uphold the

Ordinance was Dr. Baar's testimony. Instead, Respondents contend that the testimony of both experts was arguably "unsubstantiated speculation" and then cite portions of the District Court's opinion that prove that Dr. Wachter's testimony was based on statistics gathered from the operation of the current Fort Lee market, while Dr. Baar's assertions were based on a twenty-year old study performed in a different city and state. Respondents' Brief at 18. Petitioner is hard pressed to think of a more telling example of the contrast between expert testimony that has a valid connection to the inquiry at hand (the present Fort Lee housing market) and expert testimony that has no such connection to the situation at issue. Clearly, Dr. Wachter's testimony, derived from the escrow fund established in this matter and the proofs provided by Fort Lee's own housing and tax officials, met the "valid connection" test for the determining the import of expert evidence established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), while Dr. Baar's testimony did not. Therefore, the District Court's reliance on Dr. Baar's baseless speculations violated this Court's standards concerning the treatment of expert testimony.

CONCLUSION

For the reasons stated above and in Petitioner's initial brief, 440 Company respectfully requests that this Court grant its petition for a writ of certiorari.

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